Docket No: 82-444

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In The
Supreme Court of the United States

October Term, 1982

GREITZER & LOCKS, GENE LOCKS and
MARTIN GREITZER; NEIL R. PETERSON,
Petitioners,

v.

JOHNS-MANVILLE CORPORATION and
JOHNS-MANVILLE SALES CORPORATION;
RAYBESTOS-MANHATTEN, INC.;
EAGLE-PICHER INDUSTRIES, INC.;
UNARCO INDUSTRIES, INC.;
FIBREBOARD CORPORATION;
H.K. PORTER COMPANY;
SOUTHERN TEXTILE CORPORATION;
THE CELOTEX CORPORATION;
KEENE CORPORATION,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1379

Greitzer & Locks, Gene Locks and Martin Greitzer; Neil R. Peterson,

Appellants,

v.

Johns-Manville Corporation and Johns-Manville Sales Corporation; Raybestos-Manhatten, Inc; Eagle-Picher Industries, Inc.,; Unarco Industries, Inc.; Fibreboard Corporation; H.K. Porter Company; Southern Textile Corporation; Pittsburgh Corning Corporation; The Celotex Corporation; Keene Corporation,

Appellees,

United States of America,

Amicus Curiae.

Virginia Asbestos Plaintiffs,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk & Newport News. J. Calvitt Clark, Jr., District Judge.

Argued June 8, 1982 Decided June 17, 1982

Before WINTER, Chief Judge, BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, Circuit Judges, sitting in banc.

Robert C. Nusbaum (Hofheimer, Nusbaum, McPhaul & Brenner on brief) for Appellants; C. Michael Montgomery, C. Grigsby Scifres (Seawell, Dalton, Hughes & Timms on brief) for Johns-Manville Corp. and Johns-Manville Sales Corp.; Archibald Wallace, III (Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller on brief) for H.K. Porter Co., Inc. & Southern Textile Corporation; (William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbett, Hubbard, Smith & Payne on brief) for Raybestos-Manhattan, Inc.; (William B. Eley, Eley, Rutherford & Leafe on brief) for Eagle-Picher Industries, Inc.; (Gerard E. W. Voyer, Taylor, Walker & Adams on brief) for Unarco Industries, Inc.; (Stuart Bateman on brief) for Fibreboard Corp.; (Worth Banner, Reynolds, Smith & Winter on brief) for Pittsburgh Corporation; (John Y. Pearson, Jr., Bruce T. Bishop, Willcox, Savage, Lawrence, Dickson & Spindle on brief) for Celotex Corp.; (Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan on brief) for Keene Corp.

PER CURIAM:

The judgment of the district court is affirmed by an equally divided court.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1379

GREITZER & LOCKS, GENE LOCKS AND MARTIN GREITZER; NEIL R. PETERSON,

Appellants,

v.

JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION; RAYBESTOS-MANHATTEN, INC; EAGLE-PICHER INDUSTRIES, INC; UNARCO INDUSTRIES, INC.; FIBREBOARD CORPORATION; H. K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; PITTSBURGH CORNING CORPORATION; THE CELOTEX CORPORATION; KEENE CORPORATION,

Appellees,

UNITED STATES OF AMERICA,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk and Newport News. J. Calvitt Clarke, Jr., District Judge.

Argued October 5, 1981 Decided March 5, 1982

Before WIDENER, MURNAGHAN and CHAPMAN, Circuit Judges

Robert C. Nusbaum (Hofheimer, Nusbaum, McPhaul & Brenner on brief) for Appellants; C. Michael Montgomery (C. Grigsby Scifres, Seawell, Dalton, Hughes & Timms; William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbette, Hubbard, Smith & Payne; William B. Eley. Eley, Rutherford & Leafe; Gerard E. W. Voyer, Taylor, Walker & Adams; Stuart Bateman; Archibald Wallace, III, Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller; Worth Banner, Reynolds, Smith & Winters; John Spindle; Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan on brief) for Appellees; (Richard S. Glasser, Glasser and Glasser; Robert R. Hatten, Patten and Wornom on brief) as Amicus Curiae for Virginia Asbestos Plaintiffs (Stuart E. Schiffer, Acting Assistant Attorney General, Justin W. Williams, United States Attorney, Robert E. Kopp, John F. Cordes, Civil Division, Department of Justice on brief) as Amicus Curiae for United States.

CHAPMAN, Circuit Judge:

This appeal is from orders disqualifying the law firm of Greitzer & Locks from participation in approximately 77 Virginia asbestosis cases in which it serves as counsel. The three judges of the Norfolk and Newport News Divisions of the Eastern District of Virginia, sitting en banc, disqualified the law firm from participation in all asbestosis cases filed in Virginia because the firm employed Neil R. Peterson, who until his employment with Greitzer & Locks had been the Justice Department litigator charged with defending the United States in the Virginia asbestosis cases.

Greitzer & Locks is a six person firm located in Philadelphia, Pennsylvania. Peterson joined the firm in October of 1980 as the sixth attorney and fourth associate at the firm. In

addition to the Virginia asbestosis litigation, the firm participates in approximately 1200 other asbestosis cases nationwide. Appellees (hereafter "manufacturers") manufacture and distribute products containing asbestos.

On April 23, 1981, the so-called Norfolk asbestosis litigation involved 333 individual plaintiffs. This litigation comprised essentially all of the asbestosis litigation pending in Virginia. The United States was a party to claims of 246 of the individual plaintiffs' claims. These 246 individual claims comprised 77 separate civil actions. Greitzer & Locks served as co-counsel, representing 223 plaintiffs in 67 of these civil actions. Greitzer & Locks represented a total of 260 plaintiffs in the Norfolk litigation, whose claims comprised 77 separate civil actions.

Since this circuit follows the rule permitting appeal of orders granting motions to disqualify counsel pursuant to the "collateral order" exception to the finality requirement of 28 U.S.C. §1291, Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (4th Cir. 1978), cert. den. 439 U.S. 821 (1978), jurisdiction of this appeal is pursuant to §1291. The question of appealability of orders disqualifying counsel was expressly reserved in the Supreme Court's recent ruling in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Since this opinion expressly reserved the question of appealability of orders disqualifying counsel, Aetna Casualty & Surety Co., supra, is still binding authority in this circuit.

There is no question that Peterson is disqualified from participation in

the Virginia asbestosis cases. The fact of his personal disqualification was recognized in advance of the motion for disqualification by Peterson, the government and Greitzer & Locks, who all agreed that Peterson was to be screened from participation in the Virginia cases. This appeal concerns whether Greitzer & Locks should be disqualified from continued participation in the Virginia asbestosis cases despite the firm's efforts to screen Peterson from participation in any asbestosis cases in which the United States is a direct defendant and from all asbestosis cases in Virginia.

Our scope of review in this matter is not limited to abuse of discretion as appellees contend. In disqualification cases where the facts are not in dispute, as they are not here, it is appropriate for the appellate court "to

determine whether the District Court's disqualification order was predicated upon a proper understanding of the applicable ethical principles." Woods v. Covington Cty. Bank, 537 F.2d 804, 810 (5th Cir. 1978); Aetna Casualty & Surety Co., supra, at 1200. It is our opinion that the district court erred in concluding that the screen approved by the government would not be sufficient to protect the government from inadvertent disclosure of confidences and trial secrets Peterson may have learned while with the government.

In 1977 Peterson was employed as special litigation counsel in the Civil Division of the Department of Justice, where his duties were "to be generally involved with the coordination of the defense of asbestos litigation against the United States, and to personally undertake the defense of one major group

of asbestos cases, the . . . Norfolk cases." Peterson's principal duty from September 1977 until October 1980 was to act as counsel for the United States Navy in the Norfolk litigation. During this same period, Peterson provided strategy for the defense of the United States in asbestosis litigation generally.

In January of 1980, Peterson began looking for a position with a private firm. Sometime in July of 1980, Gene Locks of Greitzer & Locks heard that Peterson was looking for private employment and contacted Peterson about employment with Greitzer & Locks. In August of 1980, Peterson consulted the Office of Legal Counsel of the Justice Department about his employment with Greitzer & Locks. There he was advised that the Ethics in Government Act prohibited his participation in the Norfolk

cases. He was also advised that if he went with Greitzer & Locks, he would have to be screened from the firm's participation in these cases. Greitzer & Locks agreed to these limitations.

On September 10, 1980, Peterson formally advised the Civil Division of the Justice Department that he planned to participate in asbestosis litigation upon his association with Greitzer & Locks. Peterson noted his "understanding" with Greitzer & Locks that he would not participate in the Norfolk cases and certain other cases in which he participated while in government. Peterson provided the Department with proposed "shielding" provisions and asked it to indicate that it "would have no objection to the firm of Greitzer & Locks continuing to participate in current litigation, particularly that in Norfolk and Newport

News, Virginia . . . provided the firm complies with . . . 'shielding' provisions . . .." The specified shielding provisions prohibited Peterson from working, advising, or participating, indirectly, by discovery, analysis or otherwise, in the Virginia cases. He was to be denied access to the files and prohibited from sharing in profits derived from the Virginia cases.

The Civil Division was not able to finalize a recommendation for Peterson by the end of September. Peterson was therefore asked to submit a memorandum projecting his first month's duties with Greitzer & Locks. Peterson submitted this memorandum on September 30, 1980, and he left the Department of Justice effective October 3, 1980.

The Civil Division solicited its client agencies' views on Peterson's waiver request. The Department of

Health and Human Services and the Department of Labor expressed reservations about Peterson working for Greitzer & Locks, specifically noting Peterson's access to government asbestosis files and knowledge of government litigation strategy. The Navy, the client agency in the Virginia litigation, did not object to waiver of Greitzer & Locks' participation in these cases, but it did reserve its objection to the firm's participation in other cases. The Office of Legal Counsel noted that Peterson should be screened from all cases involving his client agencies, not just those in Virginia.

The Justice Department had not acted on the proposed screening arrangement by November 26, 1980, the date the manufacturers filed their motion to disqualify Greitzer & Locks from participation in the Virginia cases. Counsel for

Peterson met with the Justice Department in early January. In response to concern about Peterson's participation in any asbestosis actions against the United States, Peterson submitted a revised proposal in which he was to be screened from all asbestosis actions in which the United States was a direct defendant. In addition, in those cases in which the United States was or might become a third-party defendant, Peterson's participation was to be confined to those aspects of the plaintiffs' cases against the direct defendants. Peterson was also to be barred from taking discovery from the United States or from deposing or cross-examining any government witness. The Justice Department, on January 8, 1981, wrote Peterson, informing him that the Civil Division and all client agencies had waived "imputed disqualification" of

Greitzer & Locks from the Virginia asbestosis litigation, provided Peterson and Greitzer & Locks abided by the screening arrangements.

The merits of the appeal focus on two disciplinary rules in the ABA Code of Professional Responsibility. The first is D.R. 9-101(B), which reads as follows, "A lawyer shall not accept private employment in a matter which he had substantial responsibility while he was a public employee." The second disciplinary rule is D.R. 5-105(D), which reads as follows, "If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

A literal interpretation of D.R. 5-105(D) would require widespread

disqualification of firms employing former government attorneys. The American Bar Association, however, does not interpret D.R. 5-105(D) to mandate law firm disqualification whenever employment of a government attorney results in a firm conflict of interest. In Formal Opinion 342 the ABA Ethics Committee takes the position that disqualification of the firm may not be necessary if the disqualified lawyer has been properly screened from participation in the case and there is "no appearance of significant impropriety affecting the interests of the government." 62 A.B.A.J. 517 (1976).

Other appellate courts have followed the ABA's lead and rejected a literal interpretation of D.R. 5-105(D) when the disqualified government attorney is properly screened. Woods v. Covington Cty. Bank, supra at 812-13; Armstrong v.

McAlpin, 625 F.2d 433, 445 (2nd Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981). This court has expressed dissatisfaction with automatic, mechanical applications of the Code of Professional Responsibility. Aetna Casualty & Surety Co. v. United States, supra at 1202. We now rule that, when appropriate, the intrafirm screen is an acceptable alternative to automatic disqualification of a law firm hiring a former government attorney.

The plaintiffs and the Justice Department (on brief as amicus curiae) argue that the district court erred in rejecting the screening arrangement between Peterson and the other attorneys in Greitzer & Locks since the screen had been approved by the government. In Formal Opinion 342 the ABA Ethics Committee takes the position that the government may waive disqualification of

the firm "whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government . . .."[1] 62 A.B.A.J., supra. We are satisfied that the affected client agencies of the government are often the best judges of the suitability of screens erected to protect them from disclosure of confidences and secrets. For this reason, the government's waiver of imputed disqualification of a law firm is entitled to substantial deference. Formal Opinion 342, supra;

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1. Formal Opinion 342 also provides that government waiver of imputed disqualification does not relieve the affected law firm from undertaking its own independent evaluation of the screening arrangement.

ABA Proposed Final Draft of the Model Rules of Professional Conduct, Rule 11.1 (May 31, 1981).

Notwithstanding the deference to be afforded a governmental waiver of imputed disqualification, the courts have an independent duty to evaluate the effect on the trial process of the continued participation of an otherwise disqualified law firm. See Kesselhaut v. United States, 555 F. 2d 791 (Ct. Cl. 1977) (en banc) (per curiam); Accord, Hull v. Celanese Corporation, 513 F.2d 568 (2nd Cir. 1975); Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification, 1977 Duke L.J. 512, 520-21, 528.

The district court concluded that the intrafirm screen approved by the government would not effectively shield the government from accidental disclo-

sure of confidences and trial strategy known by Peterson. The court noted that Peterson would be participating in the trial or settlement of approximately one thousand asbestosis cases. It reasoned that these cases would take a considerable amount of time to litigate and that the small size of Greitzer & Locks and the prolonged nature of asbestosis litigation would make inadvertent disclosures inevitable. In disqualifying Greitzer & Locks the court also relied on the possibility that Peterson had already passed confidential information to other members of the law firm. This possibility of past disclosure was based on the fact that during October, November and December of 1980 Greitzer & Locks operated under the assumption that Peterson was only to be barred from participation in the Virginia cases. The court reasoned that

there was a real possibility Peterson had inadvertently disclosed confidential information while free to work on non-Virginia asbestosis cases involving the United States. Finally, the court concluded that Greitzer & Locks' unique caseload made it impossible to screen Peterson from participation in profits from all cases in which the United States was a direct defendant.

The district court was correctly concerned that the small size of Greitzer & Locks, when considered in terms of the firm's caseload (1200 asbestosis cases nationwide), would work against effectiveness of the screen. The court was also correct to be concerned about the possibility of inadvertent disclosure from the time Peterson went to work for Greitzer & Locks until the time the government approved the screen precluding Peterson's par-

ticipation in any cases against the United States.[2] See note, the Chinese Wall Defense to Law-Firm Disqualification, 128 U.Pa.L.Rev. 650, 712-13 (1980).

Doubts about the size of a firm and timely implementation of the screen may sometimes be sufficient to reject a screening arrangement. Cheng v. GAF Corporation, 631 F.2d 1052, 1058 (2nd Cir. 1980), vacated on other grounds, 101 S.Ct. 1338 (1981). On the other hand, when the government has waived imputed disqualification of a firm,

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2. While we agree that it is necessary to screen Peterson from financial participation in the Virginia cases and other cases in which the United States is a direct defendant, we do not agree with the district court that it is impossible for Greitzer & Locks to screen Peterson from direct financial participation in these cases. The indirect benefits that might accrue to Peterson do not make the screen unacceptable when Greitzer & Locks makes every effort to screen him from direct financial participation in these cases.

there is a strong probability that there has been a knowing waiver of disqualification and that the government is willing to bear the risk of inadvertent disclosures. We believe, therefore, once imputed disqualification has been waived, a possibility of inadvertent disclosure based on the size of a firm and its relative caseload is not a sufficient reason for rejecting a screening arrangement such as that in this case.

As noted in Aetna Casualty & Surety Co. v. United States, supra, we are concerned with "how real in the practical world [asserted ethical problems] are in fact." In this case the district court merely speculated that opportunities for inadvertent disclosures would arise without analyzing the specific situation in which the disclosures were to take

place.[3]

Peterson will be participating in the non-Virginia asbestosis actions against the manufacturers with other attorneys at Greitzer & Locks. Other attorneys will be participating in asbestosis actions directly against the United States. Both the direct actions against the manufacturers (on which Peterson and other attorneys at Greitzer & Locks will be working) and the direct actions against the United States (on which Peterson's co-attorneys will be working) appear to be proceeding on the same theories of liability -- negligent failure to warn, implied warranty, and strict tort. If the manufacturer's

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3. While we rule that the district court's finding of a possibility of inadvertent disclosure is too speculative, this opinion is not a ruling on the minimum showing that will be sufficient to overcome a governmental waiver of imputed disqualification.

liability is so intimately related to actions by the government, that Peterson and the other attorneys at Greitzer & Locks cannot work together on the actions against the manufacturers without Peterson disclosing confidences that would taint the Virginia plaintiffs' direct claims against the government, then disqualification of Greitzer & Locks from the Virginia plaintiffs' direct actions against the United States would be justified.

We are unsure, after considering the present record and the district court's conclusions based on a comparison of the size of Greitzer & Locks and its case-load, whether such a danger in fact exists. One circumstance making such a ruling less likely is the fact that Peterson will only be participating in non-Virginia asbestosis actions, which will of necessity arise in a different

location than the Virginia actions, and thus be less factually similar to the actions in Virginia.[4] The less similar the actions, the more likely it is that Peterson and the other attorneys at Greitzer & Locks can work together on the non-Virginia actions without risking disclosure.

Based on the foregoing, we believe that the district court failed to show that the continued participation of Greitzer & Locks in the actions directly against the United States presents a sufficient taint to the underlying trial of those cases so as to reject the government's waiver of imputed disqualification. Accordingly, we vacate the

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4. Most Norfolk and Newport News asbestosis cases involving the United States as a named defendant or a third party defendant originate in the construction or repair of Navy ships, which will not be true in many parts of the country where the firm represents asbestosis plaintiffs.

order of the district court disqualifying Greitzer & Locks from these claims.

The district court also disqualified Greitzer & Locks from further participation in the Virginia asbestosis actions directly against the manufacturers. We find that the facts in this case do not justify imposition of this harsh remedy and reverse the district court's action with respect to these cases.

The United States is joined as a third-party defendant in some of the plaintiffs' actions against the manufacturers. When he was employed by the government, Peterson was in an adversarial position to the manufacturers in these cases. Peterson did not participate in the direct defendants' strategy sessions; he did not attend settle-

ment conferences;[5] nor did he undertake joint discovery with the manufacturers.[6] Now that Peterson is with Greitzer & Locks, he continues to be in an adversarial position to the manufacturers, but he is screened from participation in any of the Virginia cases against them.

The district court accepted the manufacturers' contentions that the screen approved by the government would not adequately protect the manufacturers from the possibility of inadvertent disclosure of confidential information. While the district court was unquestion-

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5. In connection with the appeal in Glover v. Johns-Manville Corporation, 662 F.2d 225 (4th Cir. 1981), Peterson was permitted to glance at the breakdown of the manufacturer's contributions to the settlement of the direct action in that case. As noted in the appellate opinion, each contribution was less than $10,000. Id.

6. When Peterson was with the government, counsel for plaintiffs and the manufacturers separately interviewed certain government witness Peterson was privy to notes taken during these interviews by counsel for both sides.

ably obligated to carefully scrutinize any evidence of actual prejudice to the manufacturers, one important circumstance distinguishes our analysis of the manufacturers' position from that of the government. Since Peterson and the government were in an attorney-client relationship, the government was entitled to a presumption that Peterson learned confidences and secrets while employed there. E. g., In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973). Since there is not attorney-client relationship between Peterson and the manufacturers, they are not entitled to a presumption that Peterson acquired confidential information about them while he was with the government. Fred Weber, Inc. v. Shell Oil Company, 566 F.2d 602

608 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978).

In the absence of such a presumption and in the face of a governmental waiver of imputed disqualification, we believe that the district court should have had evidence of actual prejudice to the manufacturers before rejecting the screen. We find no such evidence in this record.

The manufacturers direct attention to the fact that Peterson had access to proprietary information about them that had been disclosed to the Navy Bureau of Medicine & Surgery. They also point out that Peterson was privy to notes defense counsel had taken during interviews of government witnesses (see note 5 supra) and that Peterson glanced at a breakdown of the manufacturers' contributions to the Glover settlement (see note 4 supra).

Any specific recollection that

Peterson may have of the breakdown in the Glover settlement is not likely to be inadvertently disclosed. Furthermore, the breakdown in the manufacturers' contributions to the settlement of each case varies according to the relative exposure of each individual plaintiff to each manufacturer's products. Thus, it is unlikely that Peterson gained any material insight by glancing at the settlement breakdown.

The manufacturers were also unable to demonstrate that the interview notes or proprietary information contained confidences that would materially prejudice their defense of the Virginia cases. In the absence of such evidence

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7. Asbestos litigation is of recent origin and has had explosive growth in the past five years. The number of potential cases cannot be determined. To bar Peterson from practicing as a private lawyer in this growing field of law would be unfair, particularly in view of the screen protecting his former employer and client.

and given the fact that Peterson has been screened from the Virginia cases, we believe that the manufacturers have not demonstrated that Greitzer & Locks should be disqualified from the Virginia asbestosis actions because of Peterson's access to confidential information.

The district court also ruled that Greitzer & Locks should be disqualified from all Virginia asbestosis actions because Peterson's switching sides in the midst of the asbestosis litigation created an impermissible appearance of impropriety. Intrafirm screens are destined to an uneasy relationship with the mandate of Canon 9 to avoid even the appearance of impropriety. As one commentator has suggested,

> Although broad in scope, that requirement's main thrust is to obligate a lawyer to "promote public confidence" in the American legal system "and in the legal profession." No matter how effective, Chinese walls are not likely

> to foster public confidence because the details of a law firm's efforts to avoid disqualification will doubtless make but a small impression upon public awareness. (footnotes omitted).

The Chinese Wall Defense, supra at 685. Other appellate courts have recently refused to reject an intrafirm screen solely on the basis of appearance of impropriety. Cf. Woods v. Covington Cty. Bank, supra, (must be "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur") and Armstrong v. McAlpin, supra at 445 ("appearance of impropriety is . . . too slender a reed on which to rest a disqualification order"). We also decline to reject the instant screen solely on the basis of appearance of impropriety.

Accordingly, the order of the district court disqualifying Greitzer & Locks from the Virginia asbestosis

actions against the manufacturers if reversed; the order of the district court disqualifying Greitzer & Locks from the asbestosis actions directly against the United States is vacated.

REVERSED IN PART;
VACATED IN PART.

MURNAGHAN, Circuit Judge, dissenting:

I dissent.

As is customary in cases on appeal, we do not approach the problem afresh. We have already the determination not simply of one but of three experienced district judges that fairness will not be served in the conduct of litigation in the United States District Court for the Eastern District of Virginia if the firm of Greitzer & Locks, the employer of Peterson, is permitted to continue to represent a large number of plaintiffs in asbestosis litigation.

Had the case come to us simply in the posture of a timely imposed screen insulating Peterson in advance from contacts productive of conflicts of interest, actual or apparent, I should be more inclined to accept the view of the majority. Even then, however, the reasoned judgment of three district

judges would command my respect, and I would not lightly interfere with a decision so intimately concerned with the conduct of affairs in their court.

In any event, however, that is not the situation. Peterson had served for several years as the lawyer in charge of the defenses raised by the United States government, especially the United States Navy, in asbestos claims arising in or near Norfolk and Newport News, Virginia. A law suit with multiple parties generally involves dividing up into sides. The United States and the manufacturers, as defendants, were on one side. The plaintiffs in many instances represented by Greitzer & Locks were on the other. While, in many respects, the defendants had non-coincidental positions and could be expected to jockey so as to shift liability away from themselves and toward the other defendants,

nevertheless, they had an important common purpose, namely, to avoid liability altogether. In terms of appearances, not just to the public but to the bench and bar, it stretches belief unduly not to assume that there was compromise of Peterson as counsel for plaintiff in any asbestosis case arising in Virginia and of any employer which might hire him.

In view of that it was incumbent on Peterson as a prospective employee and especially incumbent upon Greitzer & Locks as a possible employer to take every precautionary step available to them before acting so as to put themselves in a fait accompli situation. Instead they rushed to act without formalizing a satisfactory screen arrangement, and then, having already entered an employment arrangement they sought to speak in pitiable terms about the hardship to clients and to "poor"

Peterson in terms of dislocations which would result from disqualification.

However, the situation was altogether one of Greitzer & Locks' own making. Even though a lawyer has practiced in a specialized area, he has not vested right to make one group of cases a lifetime project, especially where conflicts of interest are palpable and remain, unless and until resolved in advance, inescapable disqualifiers. Peterson must, along his professional path, have obtained trial experience and other lawyer-like attribute enabling him to perform in other areas than purely and solely asbestosis claims. He doubtless was capable of earning a living in other areas. It was obviously a sensitive matter for him to take employment from a firm representing plaintiffs in asbestosis cases in Virginia when he had been working in the

same field as a defendant's lawyer for the government.

A self-imposed, unilaterally regulated "screen" leaving just to the employer, Greitzer & Locks, and the employee, Peterson, decisions as to the extent of isolation and degree of monitoring could not conceivably have sufficed. That should have been self-evident to Peterson.

Greitzer & Locks should have been at least as sensitive to the problem as Peterson. Peterson's employment with the government continued until Friday, October 3, 1980. Less than a month before, Peterson asked the Justice Department's consent to a screening arrangement which would permit him to take employment with Greitzer & Locks. There is no evidence of unreasonable delay on the part of the Justice Department in not having an answer to a

complicated question involving several government agencies in the short span of twenty-odd days. Peterson essentially immediately[1] after departure from government employment, on October 6, 1980, began providing his services to Greitzer & Locks without having worked out any agreement with his erstwhile employer, the government, to satisfy justifiable anxieties and concerns which that immediately previous employer manifestly felt. The behavior of Greitzer & Locks in permitting employment to become effective in such circumstances was simply unprofessional and unacceptable.

Subsequently, a screening process imposing substantial increases in restrictions on Peterson and on Greitzer

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1. October 4, 1980, was a Saturday, and October 5, 1980, was a Sunday.

& Locks was worked out between Peterson and the government, although it was not accomplished until four months later on January 9, 1981.[2] A screening process

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2. In this connection, it is not irrelevant to observe that the waiver of disqualification did not proceed purely and simply from satisfaction on the government's part that it would not be disadvantaged by Peterson's employment by Greitzer & Locks. Rather, it was in large measure a matter of the lesser of two evils. In the case of two evils, one does not cease to be an evil just because it is accepted by the person faced with the choice, in order to avoid a greater evil. The government was concerned that, in the future, in other cases, involving other parties, it might encounter difficulty in obtaining desired employees who might be disinclined to work for the government if that meant that they would subsequently have to forego other employment. Yet the reasons for rules requiring such foregoing of attractive employment possibilities stemmed from other sources besides simply an employer such as the Department of Justice or the United States Navy. They have to do with the question which is core central here, namely, the insurance of fairness and unquestioned impartiality, without undue advantage, in the administration of justice. The manufacturer defendants, while naturally doubts arise as to their motivations in seeking disqualification of opposing lead counsel in a large number of cases, are, nevertheless, entitled to a judicial atmosphere uncontaminated by the ineradicable grounds for suspicion which Greitzer & Locks and Peterson have created by their behavior in the present case.

is an understandable procedure for approaching the tangled and troubled question of potential conflicts on the part of lawyers. It must be recalled, however, that the customary situation arises with respect to one or at most a handful of cases. Most situations do not involve the magnitude of hundreds of separate pieces of litigation such as are here involved.

Furthermore, and most basically, a screening process depends on the unquestioned integrity of those whose undertakings totally to disassociate themselves from certain aspects of specific litigation, or from conduct of affairs of their law firms in some areas, must be worthy of unquestioned belief.[3]

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3. "It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification." Trane v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

Greitzer & Locks and Peterson did not come before the district court entitled to such implicit faith in their words. They tarnished their reputation for reliability and dependability by their actions in October 1980 when Peterson was hired by Greitzer & Locks in circumstances of "just trust me, you've nothing to worry about." The district court acted in its discretion in losing faith.[4] It, therefore, acted in its

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4. The district court noted:

(2) Peterson accepted employment with the law firm and went to work with the firm before any agreement was worked out between the Government and the firm.

(3) Peterson worked with the firm for three months before waiver agreement was worked out.

J.A. at 595.

This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court.

J.A. at 598.

discretion in finding that a screen, the success of which depended on persons who were not dependable, was not sufficient to the purpose.

Appellants make much of the supposed regrettable imposition suffered by the clients in the hundreds of asbestosis cases here involved. Quite apart from the consideration that, whichever way our decision may turn, some clients are going to be injured, and independently of the fact the Greitzer & Locks brought it on themselves and on their clients, I venture the observation that the client loss through disassociation from Greitzer & Locks may not be as severe pictured by that interested party. In the first place, it is to me a matter of some concern that, as the record reveals, Greitzer & Locks established a uniform policy, presumably for the approximately 1500 cases in which it

represents the plaintiffs, of demanding a contingent fee amounting to 40% of the gross recovery, as well as all costs incident to the services provided, unless there were an appeal, in which case the compensation would increase to 45%. The justification for such large percentages in contingent fee situations derives from the risk that the plaintiff may lose and that his or her counsel, heretofore, may have expended substantial effort yet have gone entirely uncompensated. The validity of that assumption is strong when one considers a single case. However, its reliability as a foundation essentially dissipates as the number of cases increases and the virtual certainty of recovery in many of them increases with it. That Greitzer & Locks itself should not have moved on its own to ameliorate what appears to me a very questionable overall fee arrange-

ment suggests a mercenary approach inconsistent with the duty of fair representation. While plaintiffs may lose a little in time in securing new representation, their likelihood of benefitting in the end is at least as great as the hypothetical loss from having Greitzer & Locks disqualified as their representatives.

Along the same lines consider the awkwardness of the approach taken by Greitzer & Locks to the present appeal. The firm did not, as far as the record discloses, even consult a single client as to whether the appeal should be lodged. The appeals were simply filed in the name of the law firm itself. The indication again is strong that the lawyers' welfare took precedence in the minds of Greitzer & Locks over the welfare and interest of the clients. We have made no point of the possible lack

of jurisdiction deriving from the want of a proper party appellant. Generally the rules are applied very liberally so as not to cost a party his day in court. Nevertheless, the contention was vigorously advanced by appellees, yet could have been eliminated in advance by the simple expedient of obtaining the consent of at least one and perhaps several appellants. That indicates a lack of that thoroughness which we generally associate with first-rate counsel.

Greitzer & Locks put forward as an extenuation the consideration that, with the number of its asbestosis clients well in excess of 1000, it would impose an impossible burden to require it to obtain authorizations to appeal from each plaintiff. However, that argument is not available in the usual case involving only one or at most a handful

of would-be appellants, and it really boils down, therefore, to a clear demonstration that, by undertaking representation of such a large number of parties, Greitzer & Locks confessedly has given and has been content to give to each plaintiff less thorough representation than if it had restricted the number of representations it sought to undertake in the same area.

This is not an entirely trivial observation. The case belongs to the client, not to the lawyer. It is not beyond the realm of possibility that one or more individual plaintiffs, had they been asked and fully informed of their alternatives, as they were entitled to expect, might have decided that they wished to take advantage of the existence of the disqualification order in the district court to substitute other counsel more qualified, in the

minds of the plaintiffs at least, to present their case in the strongest most effective fashion.

Accordingly, I would affirm the decision promulgated by the three district judges.[5]

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5. It will, perhaps, not go unobserved that I have omitted referring to the American Bar Association's Code of Professional Responsibility as a source of support for my conclusion. The ABA Code is but one set of moral standards, albeit one worthy of close attention and not lacking in persuasive authority. The point is that the result arrived at by the district court should be affirmed even had no ABA Code existed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK & NEWPORT NEWS DIVISIONS

IN RE: ASBESTOS CASES CP-77-1

AMENDED OPINION AND ORDER

Between 1977 and 1980 Neil R. Peterson defended the United States in a major group of asbestos cases (the Norfolk cases) in the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia. In 1980, Mr. Peterson joined the law firm of Greitzer and Locks. As of April 23, 1981, Greitzer and Locks was co-counsel of record representing two hundred sixty (260) plaintiffs, the United States being involved in two hundred twenty-three (223) of such claims. This matter is before the Court to determine whether the employment of Greitzer and Locks of Neil R. Peterson requires

disqualification of the law firm from further participation in the Norfolk cases.

Background

This matter arises out of one group of a great number of claims that have been brought in various jurisdictions by plaintiffs alleging that they have contracted asbestos-related diseases through exposure to asbestos while employed at various government and private shipyards and plants. The plaintiffs have brought these suits against the manufacturers of the asbestos products and in many cases the manufacturers have brought in the Government and the various shipyards as third-party defendants to the actions. In some cases, the plaintiffs have filed direct actions against the United States.

The Norfolk litigation presently* involves three hundred thirty-three (333) individual plaintiffs who have filed asbestos-

related claims in the Norfolk and Newport News Divisions of the United States District Court for the Eastern District of Virginia. In the Norfolk litigation, the United States is a party to the claims of two hundred forty-six (246) of these individual plaintiffs. These two hundred forty-six (246) individual claims are represented in seventy-seven (77) separate civil actions. A number of the defendant-manufacturers of asbestos in the Norfolk cases have filed a motion to disqualify the law firm of Greitzer and Locks, which as of April 23, 1981, serves as co-counsel representing two hundred sixty (260) plaintiffs in the asbestos cases filed and pending in this Court, because of the firm's employment of Neil R. Peterson, who previously represented the Government in the Norfolk litigation. The full statistics relating to the involvement of Greitzer and Locks, Mr. Peterson and the

United States are revealed in the following tabulation.

*Pending Asbestos Cases
Norfolk/Newport News Divisions
As of April 23, 1981

Total number of individual plaintiffs	333
Total number of civil actions	114
Total number of plaintiffs where United States is a party	246
Total number of civil actions where United States is a party	77
Total number of plaintiffs represented by Greitzer and Locks	260
Total number of civil actions where Greitzer and Locks is co-counsel	78
Total number of plaintiffs where United States is a party and Greitzer and Locks is co-counsel	223
Total number of civil actions where United States is a party and Greitzer and Locks is co-counsel	67

The defendants urge that Canons 4, 5, and 9 and Disciplinary Rule 5-105(D) require the disqualification of Peterson's law firm despite the screening arrangements adopted by the firm. Neil Peterson

and the law firm of Greitzer and Locks urge that the screening procedures adopted by the firm will adequately shield Mr. Peterson from the rest of the firm's involvement in this litigation so that the firm need not be disqualified from continued participation in this litigation.

This motion to disqualify was argued before the Court on January 27, 1981. On February 27, 1981, an evidentiary hearing was held before the three active status judges of the Norfolk and Newport News Divisions of the Court sitting en banc.

Facts

In 1977 Neil R. Peterson was employed as Special Litigation Counsel in the Department of Justice. As Special Litigation Counsel, Peterson's duties were "to be generally involved with the coordination of the defense of asbestos litigation against the United States, and to personally undertaken [sic] the defense of one major

group of asbestos cases, the so-called 'Norfolk cases.'" (Affidavit of Neil R. Peterson p. 7). Mr. Peterson's affidavit states that, in the Norfolk cases, he was involved in litigating three types of cases: suits by civilian employees of the United States working at the Norfolk Naval Shipyard in Portsmouth, Virginia, against various manufacturers of asbestos who, in turn, impleaded the United States as a third-party defendant; suits by former members of the United States Navy or the Naval Reserve against various manufacturers of asbestos, who in turn impleaded the United States; and suits by employees of the Newport News Shipbuilding and Dry Dock Company against various manufactuers of asbestos who have in turn impleaded the United States as a third-party. In this last category, there are also direct actions filed by the plaintiffs against the United States. Mr. Peterson also

participated with defense counsel in several settlement negotiations and reached a settlement agreement in Glover v. Johns-Manville Corp., et al. v. United States.

At least as early as January 1980, Mr. Peterson began to negotiate for employment with a private firm. (Transcript of Hearing February 27, 1981, p. 69). Mr. Peterson left the Department of Justice on October 3, 1980, and on October 6, 1980, Mr. Peterson joined the law firm of Greitzer and Locks. Greitzer and Locks is a five-man firm (two partners and three associates) located in Philadelphia, Pennsylvania. Mr. Peterson is working for the firm as a salaried employee, or associate. The firm serves as co-counsel representing 260 of the 333 plaintiffs in the asbestos cases filed and pending in this Court and represents approximately 1500 plaintiffs in claims in various jurisdictions.

Although it was agreed at the outset of Peterson's association with the firm that Peterson would not participate in the Norfolk litigation, it is undisputed that Mr. Peterson was hired by Greitzer and Locks because of his expertise in asbestos litigation and with the understanding that he would participate in asbestos litigation in other courts.[1] The decision of the firm to bar Peterson from participating in the Norfolk litigation was made apparently on the grounds that such participation would violate Ethics in Government Act. 18 U.S.C. § 207(a)(1980),[2] and not

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[1]Greitzer and Locks apparently intended to bar Peterson from all Norfolk asbestos litigation handled by the firm without regard to whether the United States is a party to any specific action.

[2]18 U.S.C.A. § 207(a) prohibits a former government employee from acting as agent or attorney on a case or other particular matter involving specific parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as a government employee.

because Peterson possessed any secrets or confidences of the Government. (Transcript of Hearing held on February 27, 1981, p. 158).

Mr. Peterson vigorously urges that, while serving as Special Litigation Counsel in the Department of Justice, coordinating the defense of asbestos litigation against the United States and personally defending the United States in the Norfolk cases, he did not gain or have access to any confidential information or secrets of the Government that would in any way aid any of the plaintiffs in the Norfolk litigation. More specifically, Peterson asserts that he has no "present" or "specific" recollection of any such information but that his "general" recollection of the information to which he was privy while employed by the Department of Justice is that the information would be of no litigative value to the plaintiffs. The various

"client" agencies of the Department of Justice disagreed as we shall later see.

In September 1980, Peterson notified the Government of his intent to participate in asbestos litigation upon his association with the firm of Greitzer and Locks and sought confirmation that his representation would pose no conflict in terms of his previous representation of the United States. In addition, Peterson requested a waiver of any imputed disqualification of the firm of Greitzer and Locks from continued participation in the Norfolk litigation provided that the firm complied with certain screening provisions. These screening provisions stated that Peterson:

(1) Could not directly work on the Norfolk cases.

(2) Could not advise them on any matters concerning those cases.

(3) Could not participate indirectly in those cases, by way of legal

analysis, taking or preparing for any discovery, advice or in any other way whatsoever.

(4) Could not be given access to any of the files.

(5) Could not share in any monies derived from those cases.

In response to Peterson's request for confirmation of his participation in various asbestos litigation, the Department of Justice circulated a letter to the various client agencies to determine whether any agency would object to Peterson's participation in actions against the United States in cases in which Mr. Peterson had had no personal or supervisory role while at the Department of Justice. Specifically, the Department was concerned that Peterson may have acquired privileged information about the agencies through the confidential attorney-client relationship. The Department of Health and Human Services responded on November 26, 1980, stating:

"Based on our lengthy association with Mr. Peterson in preparation for the defense of asbestos cases in which this Department is or may be a defendant we have the following concerns about Mr. Peterson's current activities:

> Mr. Peterson has had free and complete access to records of this Department regarding the effects of asbestos.
>
> He has had immediate and constant contact with employees of this Department who are experts in this area of science.
>
> In personal meetings and interviews with scientific employees of this Department, who will in all likelihood be witnesses in these cases, he has in many cases established a close working relationship and unique rapport. Thus, he has been able to assess the strengths and weaknesses of our position and to even formulate the manner in which the factual and scientific portion of the cases will be presented.

Consequently, we have serious reservations about the propriety of Mr. Peterson's continued activities in these cases because our collaboration with Mr. Peterson seems to warrant a conclusion that an attorney-client relationship existed between Mr. Peterson and possible witnesses in these cases who are employed by this Department.

Defendant's Exhibit 7.

The General Services Administration responded on December 3, 1980, stating:

> Mr. Peterson was Special Litigation Counsel for 3 years, approximately 2 of which he spent as coordinator of all asbestos litigation. In fact, Mr. Peterson states that he was "strategy coordinator of asbestos litigation against the United States." As such, his position would refute his statement that he has ". . .no 'inside' knowledge concerning any agency of the United States in relation to asbestos issues, either documentary or mental . . ."
>
> As "strategy coordinator," he would be privy to inside, special information, as well as, trial strategy used in the asbestos cases. Since most asbestos cases concern similar legal and factual issues, Mr. Peterson is knowledgeable on the strategy position that the Government presently takes and will probably take on all cases (whether or not Mr. Peterson personally handled them).

Defendants' Exhibit 6.

On December 4, 1980, the U.S. Department of Labor responded:

> [W]e know of no confidential information supplied to Mr. Peterson in connection with asbestos litigation. However, we cannot be positive that no such information was supplied. In any event, our concern would not be so much with specific cases as it would be with Mr. Peterson's knowledge,

> gained as a result of his employment with the Department of Justice, of the Government's tactics and strategy in asbestos litigation. We feel that Mr. Peterson must be as familiar with the Government's tactics and strategy, and its strengths and weaknesses, and what it can and cannot prove as anyone. It is our opinion that all of this must be considered in considering Mr. Peterson's request.

Defendants' Exhibit 9.

Based on these responses and its own evaluation of the situation, the Department of Justice had serious concerns that Peterson's participation on behalf of the firm in other asbestos litigation against the United States would either intentionally or through mere inadvertence erode the effectiveness of the proposed screen in the Norfolk and Newport News cases. It felt that if Peterson were to participate in litigation involving similar if not identical legal and factual issues present in the Norfolk litigation the "screen" may prevent him from communicating information to his new law associates about the Norfolk cases, however, the

screen would not prevent him from using and communicating the very same information in connection with the other similar cases. As a result, the Department expressly conditioned its granting of a waiver of disqualification of the firm upon the firm's promise to adopt procedures to screen Peterson from involvement in any cases where the United States was a party. Specifically, the Government required that Peterson be screened from and not participate in any way in any case in which the United States is, or may become, a direct defendant. In addition, the Department required that, in cases where the United States is or may become a third-party defendant, Peterson's participation be confined to those aspects of the plaintiffs' cases against the direct defendants and that Peterson be barred from participating in taking discovery from the United States, deposing or cross-examining

any Government witnesses or giving advice in such matters.

By letter of January 7, 1981, Mr. Rogovin as counsel for Mr. Peterson, acknowledged the concerns of the Government and agreed that these additional safeguards would be adopted by Peterson and the law firm. Based upon this promise to institute these additional safeguards, on January 9, 1981, the Department of Justice waived the imputed disqualification of the firm of Greitzer and Locks in the Norfolk litigation.

Discussion

The ethical standards relating to the practice of law in this Court are set forth in the American Bar Association Code of Professional Responsibility (ABA Code), see Local Rules of Practice, United States District Court of the Eastern District of Virginia, Rule 7(I); and it is the non-delegable responsibility of this Court to

see that lawyers practicing before this Court maintain the highest standards of professional conduct in the management of cases before it, and to insure that nothing, not even the appearance of impropriety, is permitted to tarnish the judicial process or shake the confidence of the public in the integrity of the legal profession. Kesselhaut v. United States, 555 F. 2d 791, 794 (Ct. Cl. 1977); Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980); Schloetter v. Railoc of Indiana, Inc., 546 F. 2d 706, 710 (7th Cir. 1976); Hull v. Celanese Corp., 513 F. 2d 568, 571 (2d Cir. 1975); In re Gopman, 531 F. 2d 262, 266 (5th Cir. 1976); Richardson v. Hamilton International Corporation, 469 F. 2d 1382, 1385 (3rd Cir. 1972), cert. denied, 411 U.S. 986 (1973). Accordingly, any waiver filed by the Government is not binding upon this Court. See Kesselhaut v. United States, 555 F. 2d at 794. Indeed, without firm judicial support, the high

moral standards set out in the ABA Code would be "only reverberating generalities." Empire Linotype School v. United States, 143 F. Supp. 627, 633 (S.D. N.Y. 1966). Thus, it is the clear and independent duty of this Court to determine, after analyzing all of the circumstances in this matter in light of the goals of the Code of Professional Responsibility and the role of the legal profession in our society, whether the employment by Greitzer and Locks of Neil Peterson, who previously represented the United States in the Norfolk cases, requires disqualification of the law firm from further participation in Norfolk cases involving the United States.

Disciplinary Rule 9-101(B) states: A lawyer shall not accept employment in a matter in which he had substantial responsibility while he was a public employee. The policy considerations underlying the mandatory prohibition of DR 9-101(B) are

several: "The treachery of switching sides; the safeguarding of confidential governmental information from future use against the Government; the need to discourage Government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving Government service, and the professional benefit derived from avoiding the appearance of evil." American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion 342, p. 3-4 (November 24, 1975) (hereinafter Formal Opinion 342). The Ethical Consideration underlying DR 9-101(B) is that such conduct "would give the appearance of an impropriety even if none exists," EC 9-3, in violation of Canon 9 which provides that "A Lawyer Should Avoid Even the Appearance of Impropriety."

The law presumes that an attorney possesses all confidential information to

which he had access in his prior representation of a client, See Arkansas v. Dean Foods Products Co., 605 F. 2d 380, 384-85 (8th Cir. 1979), overruled on other grounds, In re Multi-Piece Rim Products Liability, 612 F.2d 378 (8th Cir. 1980); Schloetter v. Railoc of Indiana, Inc., 546 F.2d at 710; Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); and this rule requiring attorneys to refrain from involvement in matters in which they had substantial responsibility while public employees recognizes the potential that exists for attorneys to disclose the confidences of former clients, in violation of the Disciplinary Rule of Canon 4, "A Lawyer Should Preserve the Confidences and Secrets of a Client." Requiring lawyers not to accept employment under these circumstances or disqualifying lawyers from participating in such matters "frees lawyers from the difficult task of erecting Chinese walls

in their own minds between what is confidential and what is not, and forwards the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice." Hull v. Celanese Corp., 513 F.2d at 569.

In a professional relationship, "[B]oth the lawyer and the client should expect that the lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation on the client's behalf." Trone v. Smith, 621 F.2d at 998. Where the potential for disclosure of confidences exists, disqualification is required because, as stated by the Second Circuit in Emle Industries, Inc. v. Patentex, Inc., 478 F. 2d at 571:

> [A] lawyer's good faith, although essential in all his professional activity is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-

> discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety. In neither event would the litigants' or the public's interest be well served. The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.

While employed as Special Litigation Counsel in the Department of Justice, Peterson personally defended the United

States in the Norfolk asbestos litigation. Clearly, Peterson is barred by DR 9-101(B) and 18 U.S.C.A. §207(a) from participating in the Norfolk litigation and no one contends that Peterson is eligible to participate personally in the Norfolk litigation involving the Government.

As stated before, Peterson adamantly maintains that despite his extensive involvement in the Norfolk cases and his involvement in coordinating the defense of all asbestos litigation against the United States, he has absolutely no "useful" or "inside" Government information that would be of any litigative value to the plaintiffs. More specifically, he states that he has no "present" or "specific" recollection of any such information but that his "general" recollection of the information to which he was privy while employed by the Department of Justice is that the information would be of no benefit to the plaintiffs, nor would

its disclosure disadvantage the Government. However, as noted above and explained below, it is the position of the Government that Peterson does possess some confidences or secrets of the Government which would in fact aid the plaintiffs in the Norfolk litigation to the detriment of the United States.

When Peterson left the Department of Justice and joined a private law firm which represents plaintiffs in asbestos litigation, the Government had serious concerns about Peterson's participating in cases where the United States was involved. The General Services Administration, the Department of Health and Human Services, and the Department of Labor had all expressed concern that Peterson either obtained or might have obtained confidential information concerning their agency while serving as an attorney for the Department of Justice. These concerns are not

frivolous since, as a result of an attorney-client relationship, a presumption arises that confidential communications have been exchanged. Arkansas v. Dean Foods Products Co., 605 F.2d at 384-385; Schloetter v. Railoc of Indiana, Inc., 546 F.2d at 710; Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562.

Based on the concerns expressed by the client agencies and its own evaluation of the situation, the Department of Justice conditioned the granting of the waiver of the law firm on Peterson's being screened from participating in cases where the United States was a party. Specifically, the United States was concerned that information Peterson might communicate to his law partners while participating in cases similar to the Norfolk cases would then be used by those partners in the Norfolk litigation.

Peterson and Greitzer and Locks concede that Peterson is barred by 18 U.S.C.A.

§ 207(a) from participating personally in the Norfolk litigation in which the Government is a party. This Court FINDS, however, that based on Peterson's prior representation of the Government and the express concerns of the Government that Peterson is disqualified from such representation by not only 19 U.S.C.A. § 207(a) but also DR 9-101(B) and the Disciplinary Rule of Canon 4.

Disciplinary Rule 5-105(D) states: If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm, may accept or continue such employment. Disciplinary Rule 5-105(D) recognizes "the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves

when the information relates to existing employment." Formal Opinion 342, n.2. Because of the continuing danger that an attorney may unintentionally transmit information gained through the attorney's prior association due to the day-to-day contact an attorney has with other members of his firm, disqualification is required to guard against the possibility of inadvertent use of confidential information. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), overruled on other grounds in Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc). This disqualification is required without showing that an attorney possessed explicit confidences which were expressly transmitted to or received by the other members of the law firm during some conference, letter-drafting or phone conversation and is required whether or not the other members of the

firm are actually exposed to the information. Trone v. Smith, 621 F.2d at 999; see also Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978); Schloetter v. Railoc of Indiana, Inc. 546 F.2d at 711; Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973). The threat remains that the firm may have been tainted by the improper receipt of privileged information and it is the possibility of the breach of confidence, not the fact of the breach that triggers disqualification. Trone v. Smith, 621 F.2d at 999; see also Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc).

Under DR 5-105(D) and Canon 9, a court must disqulify a law firm from continued representation where such representation constitutes a threat of taint to the integrity of the trial or where such continued representation

creates the appearance of impropriety. Armstrong v. McAlpin, 625 F.2d 433; Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980); Board of Education v. Nyquist, 590 F.2d 1241 (2d Cir. 1979). The integrity of a trial may be tainted where a law firm is potentially able to use information which a former Government attorney gained in confidence while serving as a public employee and which was unavailable to the other side. Armstrong v. McAlpin, 625 F. 2d at 444.

Law firms have employed various methods of screening a possibly tainted attorney from the rest of the firm's involvement in a particular case in order to avoid the difficulties caused by an inflexible application of DR 5-105(D). The ABA stated in Formal Opinion 342 that the Government may waive the vicarious disqualification of a law firm where the Government is satisfied that a former

Government attorney is (1) effectively screened and isolated from any direct or indirect participation in the matter and (2) where there is no appearance of significant impropriety affecting the interests of the Government. However, despite a Government waiver, it remains the clear and independent duty of the Court to scrutinize the screening procedures and to disqualify the firm if the Court finds that, despite the attempted screening, continued representation constitutes a threat to the integrity of the trial or creates the appearance of impropriety. Furthermore, if, after evaluating the sufficiency of a proposed screen a court still harbors doubts as to the sufficiency of the screen, the court should resolve the issue in favor of disqualification. Cheng v. GAF Corp., 631 F. 2d at 1058; Hull v. Celanese Corp., 513 F.2d at 571; Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.,

607 F.2d at 189-90; IBM Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978).

Peterson and his firm, Greitzer and Locks, urge that their screening procedures, some of which were instituted before Peterson joined the firm and some of which were adopted over three months after Peterson joined the firm are sufficient to isolate Peterson from the rest of the firm's involvement in the Norfolk cases so as to remove any threat to the integrity of the trial or create any unacceptable appearance of impropriety. To repeat, the safeguards adopted by the firm provide that Peterson is not to work directly or indirectly on the Norfolk cases, that Peterson is not to have any access to any Norfolk litigation files and that Peterson is not to share in any income derived from the Norfolk litigation. The attorneys and staff in the firm have been instructed not to discuss any of the Norfolk cases

with Mr. Peterson either directly or within his earshot. In addition, Peterson and the firm have agreed that Peterson will not participate in any way and will be screened from substantive involvement and financial participation in cases in which the United States is or may become a direct defendant. Furthermore, where the United States is or may become a third-party defendant, Peterson will be confined to participation against the direct defendants only and will not participate in any aspect of the case, including discovery, relating to the involvement of the United States. In these cases, the firm will conduct a case-by-case review to determine whether Mr. Peterson should refrain from participating at all.

Peterson's employment with Greitzer and Locks constitutes a threat to the integrity of the Norfolk litigation despite the attempts of the firm to screen him from

any participation in the litigation. Peterson will be participating with other members of Greitzer and Locks in the trial or settlement of over a thousand asbestos cases in other jurisdictions. In addition, the Norfolk litigation in which Greitzer and Locks are co-counsel as of April 23, 1981, involves the claims of two hundred sixty (260) individual plaintiffs represented in seventh-eight (78) separate civil actions. Greitzer and Locks is a six-man law firm. These cases will take a considerable amount of time to litigate and, despite the protestations of Peterson and the firm, it is unclear how disclosures, even inadvertent, can be prevented given the size of the firm and the prolonged nature of the litigation. Because of the magnitude of the litigation, there is the continuing risk that the agreement not to talk with Peterson about the cases or speak near Peterson about the

cases will not be effective given the close, informal relationship which exists among law partners and associates, especially in a firm the size of Greitzer and Locks and the financial incentives which exist to discuss current employment.

In addition, it is undisputed that Peterson joined the law firm several months before securing from the Government a waiver of imputed disqualification. From October until early January, both Peterson and the firm were under the impression that Peterson was not barred from participating in other cases where the United States was a direct party. The Government granted the waiver conditioned upon the firm's agreeing to screen Peterson from any participation in such cases. However, prior to acquiring the waiver Peterson did in fact file a motion to appear in the New Jersey cases in which the United States was a direct defendant. Because of the lapse of time between accepting the employment and

securing the terms of the Government's waiver there exists the real possibility that improper communication did in fact pass between Peterson and his firm.

Furthermore, the screening proposition that Peterson limit his involvement to participation only against the direct defendants in cases where the United States is or may become a third-party defendant is unrealistic and does not recognize the subtle and complex dynamics of litigation. In addition, although the law firm has offered to completely screen Peterson out of these cases on a case-by-case basis where they feel it is necessary to do so, this would require the firm to make awkward determinations often on the eve of trial and in the face of serious financial considerations.

Furthermore, although Peterson is not to participate in any monies derived from the Norfolk litigation where the Government

is involved, the magnitude of the claims involved and the size of the firm make it highly speculative if not incredible to presume that Peterson would not participate directly or indirectly in any of the monies received by the firm. These Norfolk cases present the possibility of the firm's recovering settlements or judgments on two hundred twenty-three (223) (Government cases) individual claims. Any income derived from these cases is bound to be channeled into the capital improvement of the firm and the salaries of its employees, including Peterson. It is likely that any capital improvements in a six-man law firm will inure either directly or indirectly to the benefit of Peterson as one of the members of that firm. Thus, the circumstances surrounding this particular litigation and the size of the law firm preclude the effective shielding of Mr. Peterson from involvement in the monies derived

from the Norfolk litigation. While we are not rejecting screening procedures nor are we applying an inflexible rule, no case has been cited to this Court nor has this Court been able to find any case where screening has been approved where the litigation is of such a protracted nature and which plays such a prominent role in a law firm's activities as is here presented.

Not only is the integrity of the litigation threatened by Peterson's employment with Grietzer and Locks, but such employment also creates the unacceptable appearance of impropriety and, as noted earlier, the Court, in considering a motion for disqualification, must also consider the appearance of impropriety. The public understandably will see an appearance of impropriety where, despite the clear prohibition of the Code, Peterson changes sides in the middle of ongoing

litigation and his firm is allowed to continue its participation on the basis of the assurances that Peterson will not discuss the cases.

The public will judge the appearance of impropriety from a layman's viewpoint without an appreciation of a lawyer's obligation as an "officer of the court." Briefly restated, the following are the undisputed facts from which the public would gain an impression of the impropriety of the law firm's continuing in the Norfolk cases where the Government is a party:

(1) While having the responsibility of defending the United States against vigorous attacks by Greitzer and Locks, Peterson was negotiating with Greitzer and Locks for a job.

(2) Peterson accepted employment with the law firm and went to work with the firm before any agreement was worked out between the Government and the firm.

(3) Peterson worked with the firm for three months before waiver agreement was worked out.

(4) Peterson, after joining the firm, entered or tried to enter a case against the Government pending in New Jersey and would be presumed to have had some conversations within the law firm about that case.

(5) The 1500 plus claims of the plaintiffs being represented by Greitzer and

Locks involve many millions of dollars and the law firm's fees whether contingent or otherwise potentially involve millions of dollars.

The public not only could but very likely would conclude that a voluntary screening process with no possibility of independent monitoring would be breached. For the Court to approve the continuance of Greitzer and Locks in the Norfolk cases where the Government is a party would seriously compromise the public's perception of the integrity of this Court and shake the public's confidence in the administration of justice.

As set out above, despite the fact that a waiver was granted by the Government, it remains the duty of this Court to insure that lawyers observe the highest

standards of professional conduct in litigation before it and this is a duty owed to the parties, the public, and the members of the bar. Without questioning Peterson's integrity or the sincerity of his efforts to disassociate himself from the Norfolk litigation, the Court is not satisfied that, under the facts of this case, screening will be effective. Certainly the lay public cannot be expected to perceive the screening to be effective. Accordingly, the Court FINDS that continued participation by Greitzer and Locks in the Norfolk asbestos litigation where the Government is a party constitutes a threat to the integrity of the trial and creates the appearance of impropriety. Armstrong v. McAlpin, 625 F.2d 433; Cheng v. GAF Corp., 631 F.2d 1052; Board of Education v. Nyquist, 590 F.2d 1241.

The question remains whether Greitzer and Locks should be barred from those

Norfolk cases in which the Government is not a party. Rule 7(D), Local Rules of Court for the Eastern District of Virginia, provides that out-of-state counsel may, upon motion, be permitted to appear and conduct specific cases in association with a duly qualified member of the bar of this Court. Pursuant to this rule, Greitzer and Locks have associated two local counsel in all of their cases pending in the Newport News and Norfolk Divisions of this Court. As of April 23, 1981, Greitzer and Locks was associated with local counsel in thirty-seven cases where the Government is not a party. As yet there is no allegation that local associate counsel have been sufficiently exposed to Greitzer and Locks since Peterson's becoming a member of that firm to have received information which would bar them under the reasoning of Rule 5-105(D). The Court foresees, however, that if

Greitzer and Locks and its two local counsel continue to work together in the thirty-seven non-Government cases, the status of the local lawyers as counsel for all two hundred sixty plaintiffs will be jeopardized. It is important to the plaintiffs that this not happen.

In fulfilling its duty, this Court is not unmindful of the right of plaintiffs to retain counsel of their own choosing and the delays inherent in changing attorneys in the midst of complex litigation. However, as stated before, in the Norfolk cases, all of the plaintiffs are represented and have been represented since inception of their actions by able local counsel. The public does not have an absolute right to maintain any particular counsel, IBM Corporation v. Levin, 579 F.2d at 283; Kramer v. Scientific Control Corporation, 534 F.2d 1085, 1093 (3d Cir.), cert. denied, 429 U.S. 830 (1976), and the

right of the public to retain counsel of its choice is secondary in importance to the Court's duty to maintain the highest standards of professional conduct to insure and preserve trust in the integrity of the bar. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 519 F.2d at 757; Hull v. Celanese Corp., 513 F.2d at 569; see also Telos Inc. v. Hawaiian Telephone Co., 397 F. Supp. 1314 (D. Hawaii 1975). The courts must strike a reasonable balance between the public's right to freely chosen counsel and the court's duty to maintain the highest ethical standards. The Court must also act quickly to prevent local counsel from becoming subject to challenge. In this case, the Court believes the proper balance has been maintained by our decision.

For all the reasons stated in the Opinion, the Court FINDS that the law firm of Greitzer and Locks is DISQUALIFIED

from further participation in the Norfolk cases.

In order to minimize the burden which may fall upon the affected plaintiffs by virtue of removing part of their legal team in the middle of complex litigation, the Court notes that these cases are currently being held in abeyance pending guidance from the United States Court of Appeals for the Fourth Circuit and that this Court will allow such additional time as is deemed necessary in setting these cases for trial to permit remaining plaintiffs' counsel to thoroughly prepare their cases.

The Court acknowledges the hardship claimed by Greitzer and Locks in disqualifying it from participating further in the Norfolk litigation. This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear

prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court. If the Court had been consulted prior to the employment, the Court would have reached the same conclusion but no loss would have occurred to Peterson or Greitzer and Locks.

Accordingly, the Court DISQUALIFIES Greitzer and Locks from further participation in the Norfolk cases.

It is so ORDERED.

/s/ John A. MacKenzie
United States District Judge

/s/ Richard B. Kellam
United States District Judge

/s/ J. Calvitt Clarke, Jr.
United States District Judge

May 6, 1981
Norfolk, Virginia

APPENDIX D

Current Law Conclusively Favors Appealability.

All Circuits considering the issue have determined that orders granting disqualification are appealable.

1. The First Circuit is one of only two circuits without even dicta on the issue. In In re Continental Investment Corp., 637 F.2d 1 (1980), in the process of concluding that orders denying disqualification are not appealable, the court noted in passing that other circuits had held that orders granting disqualification were appealable but did not reach the issue.

2. The Second Circuit, in Armstrong v. McAlpin, 625 F.2d 433, 440-441 (1980), vacated on other grounds, 449 U.S. 1106 (1981), held that orders granting disqualification were

appealable. In doing so, it noted that it had originally held orders denying disqualification were not appealable [Fleischer v. Phillips, 264 F.2d 515 (1959), cert. denied, 359 U.S. 1002 (1959)], had changed that rule to permit appeal of such denials (Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (1974), and there, based upon the experience of a number of cases and out of concern for the use of a disqualification motion as part of legal tactics, had reverted in Armstrong to holding denials non-appealable. The Second Circuit has continued to allow appeals of orders granting disqualification after this Court's decision in Firestone and Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (1981).

3. The Third Circuit, like the First, has not even dicta. In In re Fine Paper Antitrust Litigation, 617

F.2d 22 (1980), it held orders denying disqualification non-appealable, but, without any decision, noted that there were reasons for distinguishing orders denying disqualification.

4. The Fourth Circuit, in Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (1978), cert. denied. 439 U.S. 821 (1978) permitted on appeal of a disqualification, a decision followed by the panel below (Appendix B, p. 4). See also: MacKethan v. Peat, Marwick, Mitchell & Co., 557 F.2d 395 (1977).

5. The Fifth Circuit, post Firestone, allows appeals of orders granting disqualification. In re Corrugated Container Antitrust Litigation, 659 F.2d 1341 (1981); Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, 646 F.2d 1020 (1981).

6. The Sixth Circuit, which had

ruled that orders denying disqualification were not appealable [Nelamed v. ITT Continental Baking Co., 592 F.2d 290, 295 (1979)], held that an appeal was available from an order granting disqualification. General Electric Co. v. Vabron Corp., 608 F.2d 265, 266 (1979), cert. denied, 445 U.S. 930 (1980).

7. The Seventh Circuit permits appeals from orders denying disqualification. Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (1976); Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1313 (1978); cert. denied 439 U.S. 955 (1978).

8. The Eighth Circuit in the Firestone case held prospectively that orders denying disqualification were unappealable while holding that orders granting disqualification were

appealable. In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (1980).

9. The Ninth Circuit has said, after Firestone, that orders granting disqualification were appealable. In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation, 658 F.2d 1355 (1981).

10. The Tenth Circuit permits appeals of denials of disqualification. Fullmer v. Harper, 517 F.2d 20, 21 (1975); State of New Mexico v. Aamodt, 536 F.2d 1102, 1106 (1976), cert. denied 429 U.S. 1121 (1977).

11. The United States Court of Appeals for the District of Columbia Circuit permitted an appeal of the granting of disqualification in In re Investigation Before April 1975 Grand Jury, 531 F.2d 600, 605, fn. 8 (1976). While this was a criminal case in which

it might be claimed that the right to counsel of choice by an accused has more protection, the Circuit noted no such distinction in differentiating a grant of disqualification from a denial when it later ruled that denials were not appealable. Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1026 546 F.2d 1022, 1026 n. 22 (1976) fn. 22 (1976).

12. Finally, post Firestone, the United States Court of Customs and Patent Appeals has held an order granting disqualification to be appealable. Ah Ju Steel Co., Ltd. v. Armco, Inc., 680 F.2d 751 (1982).

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK & NEWPORT NEWS DIVISIONS

IN RE: ASBESTOS CASES CP 77-1

MOTION TO DISQUALIFY COUNSEL

The undersigned defendants, by counsel, move this Honorable Court for the entry of an Order disqualifying Neil R. Peterson, Esquire, and the firm of Greitzer & Locks, 1500 Walnut Street, Philadelphia, PA, from any further participation in these cases, and enjoining all other plaintiffs' counsel of record from any further communication, direct or indirect, with Greitzer & Locks and Mr. Peterson regarding these cases and asbestos-related matters. This motion is brought on the grounds that participation by Mr. Peterson and Greitzer & Locks constitutes a direct violation of the Code of Professional Responsibility of the American Bar Association, Canons 4, 5, and 9, Disciplinary Rules 9-101(B) and 5-105(D), as made applicable to attorneys practicing before this Court by Local Rule of

Practice 7(I). A supporting Memorandum of Law is filed simultaneously herewith.

Johns-Manville Corporation
Johns-Manville Sales Corporation
Raybestos-Manhatten, Inc.
Garlock, Inc., Precision Seal Division
Eagle-Picher Industries, Inc.
Unarco Industries, Inc.
Fibreboard Corporation
GAF Corporation
Armstrong Cork Company
H. K. Porter Company
Southern Textile Corporation
Pittsburgh Corning Corporation

By /s/ C. Michael Montgomery
Of Counsel for Johns-Manville Corporation and Johns-Manville Sales Corporation and per authorization of defendants as listed

APPENDIX

ABA Code of Professional Responsibility Provisions Involved

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client.

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

Canon 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

Disciplinary Rule 5-105(A)

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or if it would be likely to involve him in representing different interests, except to the extent permitted under Disciplinary Rule 5-105(C).

Disciplinary Rule 5-105(D)

If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept such employment.

Disciplinary Rule 9-101(B)

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

APPENDIX G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT LAW DIVISION

SHIRLEY KOSIK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	78 L 14725
	)	
JOHNS-MANVILLE PRODUCTS CORP.; RAYBESTOS-MANHATTAN; and UNARCO,	)	
	)	
Defendants.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable WALTER B. BIESCHKE, Judge of said court, on the 13th day of November, 1981, at the hour of 3:30 o'clock, P.M.

PRESENT:

MESSRS. LEWIS & DAVIDSON,
By: MR. W. JOSEPH HETHERINGTON,

on behalf of the Plaintiff;

MESSRS. PHELAN, POPE & JOHN,
By: MS. BARBARA HALPERN,

on behalf of the Defendant;
(Raybestos-Manhattan)

MESSRS. McKENNA, STORER, ROWE, WHITE & FARRUG,
By: MR. WILLIAM J. CORCORAN,

on behalf of the Defendant. (Unarco)

Kristine Peterson, CSR
Official Court Reporter
Richard J. Daley Center - 304
Chicago, Illinois

THE COURT: This is the matter of Kosik vs. Johns-Manville Products Corporation, et al., 78 L 14725. And this matter came on for ruling on the motion of the plaintiff for the admission of Gene Lock, pro hac vice, as additional trial counsel in this case for the plaintiff Shirley Kosik. And also as to ruling on the motion of the defendants to bar the admission of said Gene Lock pro hac vice.

And the court having heard the arguments of counsel before in this matter and having been favored with very able briefs by all parties in this matter rules that the motion of the plaintiff, Gene Lock to be admitted pro hac vice is granted.

The motion of the defendants to deny or bar his admission as counsel in this case pro hac vice is denied.

In this particular situation the court has thoroughly scoured the record, the affidavit and the memoranda that has been filed by all parties in this case. And one of the most significant determinations is that the situation of Mr. Peterson, who is an associate of Mr. Gene Lock, is significantly different in this litigation than what it was in the Norfolk group of cases involving extensive asbestosis litigation that Mr. Peterson had participated in personally in Virginia.

There in a great many of those cases, the United States was named as a third party. And in a very minor number also as a direct party defendant.

Here it has been amply demonstrated in the instant litigation that the United States is not presently involved and it

does not appear legally that it could be involved in this particular litigation.

Here the plaintiff decedent was an employee of the United States Navy. His exclusive remedy as to the United States lay under the Federal Employees Compensation Act. In addition, since there was no underlying tort cause of action against the United States on the part of the decedent by virtue of this exclusive provision of the Compensation Act, there could similarly be no third party cause of action brought against the United States. That is under the perculiar application of Federal law as enunciated in every one of the Federal District Circuits with the exception of the Fourth District which stands alone.

But on our own Seventh Circuit, Kudelka vs. American Hoist follows the lead case in Galimi vs. Jetco, Incorporated, which holds that there is no third party

cause of action that can be brought against the United States Government.

And in this litigation where you have the plaintiff decedent in the underlying original suit being an employee of the United States. And this is stated before because of the exclusivity of the Compensation Act.

Now, were the United States to be joined in the state court, of course, since the United States has not waived the sovereign immunity from case in tort, the matter would undoubtedly be transferred to the U.S. District Court. And under our Seventh Circuit case of Kudelka vs. American Hoist, and all of those cases involving all other circuits with the exception of the Fourth, it is clear that any attempt to join the United States as a third party defendant in the perculiar posture -- fact posture of this case would not succeed.

So you don't have in this litigation

the former employer of Mr. Peterson either involved directly or even as a third party defendant.

Now, it was one thing for Mr. Peterson to be disqualified in Virginia because he was there actively representing his former employer, the United States Government in all of that third party litigation.

But in this instant litigation you don't have that factor. His employer is not in this case. Even if his employer, former employer, the United States Government were attempted to be in this case it would be subject to a motion to dismiss. Which under the prevailing U.S. District Court law would very likely succeed.

I would say that the United States Government cannot, as this court perceives it, be a party to this law suit either directly or as a third party.

That takes us then to the question of whether or not when one balances the

interest between the right of the plaintiff here to choose her own lawyer as against the interest of seeing to it that there is no adverse affect upon the administration of justice flowing from the representation of counsel of plaintiff's own choosing, one then looks to see if as to the present defendants there was any compromise or would be any compromise of any confidential information that may have emanated from the present defendants to Mr. Peterson while he was trial counsel with the United States Government. And if so, whether there would be any imputation of such confidential information to any other member of the firm of Grigzer & Lock, and specifically Mr. Gene Lock.

The court has very carefully gone over the different areas that the defendants have cited. And concludes that the court is unable to find any specific instance where there was an exchange of confidential

information between Mr. Peterson and any defendant presently in this case that was involved in any prior litigation that Mr. Peterson was involved in.

For one thing it should be stated at the outset that Mr. Peterson never was an attorney for any one of these defendants. So that category of the case is not applicable here.

These defendants were never represented by Mr. Peterson. It is contended that some of these defendants may have been co-defendants with Mr. Peterson. And to that extent there may have been an exchange of information between said defendants and Mr. Peterson.

There is no specific case identified with the exception of the Glover case where there was any specific exchange of information between Mr. Peterson and the defendants.

First of all, the court notes that

while Mr. Peterson was with the Government, and that covered a period of approximately three years between 1977 and 1980, the first two years approximately were spent as a general co-ordinator wherein he had no direct trial personal participation in the litigation. And the last year or slightly in excess of the last year, he was personally involved in a series of cases known as the Norfolk litigation.

In -- By comparison a minuscule number of cases was he representing in that one year period the United States as a direct defendant. In the cases that were primarily concerned within the Norfolk were mainly adversarial third party litigation between the United States Government and actions brought by the defendants in those cases.

The Glover case was one of those adversarial third party suits brought by

a number of manufacturers against the United States as a third party defendant.

During the course of that litigation the point was raised that the plaintiff Glover in the underlying suit had obtained a settlement from the manufacturers for approximately $69,000. The manufacturers then sought to proceed against, as I indicated before, against the United States as a third party to recoup this amount of money.

The United States moved to dismiss on the grounds that the District Court had no jurisdiction under the Tucker Act for any amount in excess of $10,000 paid by any one of these individuals in that case, three manufacturing defendants who were third party plaintiffs.

The manufacturers allege on the other hand that none of them had paid more than $10,000 in settlement of the action. The trial judge in the case, in Glover third

party action, directed that the three defendants would disclose the amount that they paid to counsel for the third party defendant. Under the affidavit of Mr. Peterson that amount was disclosed.

He denies that he has any knowledge as to what the individual amounts were but he does recall that it did confirm the contentions of the third party plaintiffs that no one of them paid more than $10,000. And the case proceeded to a trial on the merits. And apparently the United States Government prevailed on the merits.

An examination of that record really doesn't disclose that there was information of such a confidential nature as far as this court perceived it, that has any substantial relation to the litigation in the instant case.

The affidavit of Mr. Peterson fully sets it out under oath as to what the circumstances were and how that was perculiarly

applicable for consideration under the then existing Virginia law which he has since indicated has been changed regarding the affect of releases of joint tort feasors in the State of Virginia.

And I really fail to see how that particular set of circumstances is such confidential information in any way which is going to adversely affect the administration of justice by having an associate of Mr. Peterson being an additional counsel in this particular instant litigation.

Apart from that one specific case no specific identifiable case has been cited by the defendants herein. No particular specific affidavit from any of the tiral counsel of all of the cases wherein the United States was involved and who had either been co-defendant of the United States or had opposed the United States in third party litigation was filed identifying or pointing out the existence or

the possibility of there being any confidentia information that might be considered detrimental to any defendant in subsequent litigation with the exception of what the court has already eluded to in the Glover case.

There has been general allegations about the United States being privied to proprietary information supplied by manufacturers to the United States Bureau of Medicine and Surgery. Examination of Mr. Peterson's affidavit, page 10, adequately explains that there was no -- that he was not privied to any such information, all though that certain manufacturers may have disclosed certain information to certain agencies of the United States Government. That never came to the personal knowledge or assimilation of Mr. Peterson or any showing that it was ever used in any litigation against any such manufacturer.

The allegations with regard to the fact that at one point the Government and certain manufacturers jointly interviewed Government employees at the Norfolk naval shipyard. Really when you inspect that it appears to be innocuous as far as there being any exchange of confidential information that Mr. Peterson obtained thereby.

This was simply a joint agreement between the United States Government and the manufacturers that they could interview any of the Government employees at the Norfolk naval shipyard is under certain guidelines and that there would be no stenotyping or transcribing of the interviews taken at the time.

And there has been no showing that--of any one of those interviews anything was conveyed to Mr. Peterson that would be a matter of any substantial detriment or any detriment to the manufacturers in this particular situation. Nothing has

been identified in that regard.

Now, I am sure that had there been during the course of those cases where Mr. Peterson personally participated as trial counsel, any divulgement of something confidential to him in those few cases where the United States was a co-defendant, whereby it could be said that he was a counsel for a co-defendant of a client, namely, the United States who was then a co-defendant of those defendants who are now in the instant litigation was any way confidential and prejudicial to the defendants or to be disclosed to the plaintiff in those underlying law suits and which is such information that he was carrying with him in the trial of this instant litigation. I am sure that there would have been an affidavit or evidence presented documenting what that particular alleged confidential information from these other cases may have been.

But it has not been identified at all in this record, and I am sure that Mr. Peterson must have encountered and dealt with a number of different trial counsel representing co-defendant among whom we now have certain defendants in the instant case.

Yet there has been no singling out, no showing whatsoever that anything of that nature was presented to Mr. Peterson.

There are broad brush stroke allegations in the briefs that as co-ordinator he became aware of the strategies that--the tactics and so forth of the manufacturing defendants. But really what he became aware of would be nothing more as the court determines than what anybody else would become aware of by extrapolating all of the discovery information that exist in these particular cases.

If one goes through any number of this type of case wherein the United States was

involved, you begin to see perhaps a general modus operandi or a general pattern perhaps of tactics or of strategy. But there has been no precise identification such as the court would have to see of what specifically was disclosed to Mr. Peterson during his employment with the United States Government which would fairly be said to say or to amount to a breach of any fiduciary obligation that you can argue that he may have owed a co-defendant.

Because that is the most that you--the closest that you can get to with regard to Peterson's relationship to the defendant in the instant case. He never was an attorney for them. In all but a bare handful of cases was he ever anything other than an adversary. Usually always third party litigation.

In those cases that Mr. Peterson has identified where the United States Government was a defendant, he described per-

culiarities of those cases and where they were filed and how the United States was dismissed out in those cases where they were named as a direct defendant.

There just is not any factual documentation as to confidential information that was ever exchanged with Mr. Peterson.

And so I specifically make that a factual finding that no contention of anything of a confidential nature that would be to the detriment of these defendants was ever exchanged between any of the defendants or their counsel in the instant case and Mr. Peterson while he was employed with the United States Government. And certainly the information he did obtain would be discernible or extrapolated from the pleadings in all of those cases just from all of the discovery that was filed in those various cases.

And I don't see that there is any substantial relationship between those

cases as far as the information that did come into the possession of Mr. Peterson and the present litigation.

So again it gets down to the final point that the focus of this court is a balancing of those interests between having a plaintiff in this asbestos litigation choose the counsel of her choice contrasted with the interest on the other hand of this court and society in general that there be a proper administration of justice. I quite frankly, for the reasons stated, do not find that the later interest has been affected or will be affected adversely by the admission of Mr. Lock as an additional counsel for the plaintiff herein. And accordingly the court does allow Mr. Gene Lock to be admitted as trial counsel in this case, or to participate as counsel in this case pro hac vice. And denies the motion of the defendant that he be barred thereby.

Thank you. That concludes the record.

(Which were all the proceedings had at the hearing of said cause.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS - COUNTY DEPARTMENT - LAW DIVISION

I, KRISTINE PETERSON, an Official Court Reporter for the Circuit Court of Cook County, Illinois, County Department-Law Division, do hereby certify that I reported in stenotype the proceedings had at the hearing of the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable WALTER B. BIESCHKE, Judge of said Court.

Official Court Reporter

Dated this 19th day
of November, 1981.

APPENDIX H

DEPARTMENT OF THE NAVY
Office of the General Counsel
3 December 1980

OGC/LD/MA:lkb

John J. Farley, III, Esquire

Director, Torts Branch

Civil Division

Department of Justice

Washington, DC 20530

Re: Asbestos Litigation

Dear Mr. Farley:

This is in reply to the letter of Mr. Chavkin, Special Assistant to the Assistant Attorney General, Civil Division, dated October 30, 1980, relating to the possible conflict of interest problems that may arise from the fact that Mr. Neil Peterson, who represented the Government in various asbestos litigation, has left the Department and is associated with the firm of Greitzer and Locks, Philadelphia, whose primary orientation is in the personal injury and workmen's compensation fields, particularly in the representation of persons with asbestos-related diseases.

In the 30 October letter, there were enclosed two requests for ethical guidance which Mr. Peterson submitted to the Justice Department on September 10 and 30, 1980. You have asked us not to make copies of Mr. Peterson's submissions but to return them to the Department when we have completed our review. Accordingly, these documents are returned herewith.

Mr. Peterson lists, among other things, those asbestos cases where the United States was either a defendant or third party defendant in which he had personal and substantial participation including supervision of subordinate attorneys, and asks the Department of Justice to confirm his understanding that the Department has no objection to his use in future litigation of general knowledge which he acquired in the representation of the United States or its employees. In that connection, he represents that --

"to the best of my present recollection, I have no 'inside' knowledge concerning any agency of the United States in relation to asbestos issues, either documentary or mental, all knowledge such as I have being in the public realm as a result of discovery proceedings."

We have talked to the principal Navy officers and employees whom Mr. Peterson interviewed, and we are satisfied that his above representation of no 'inside' knowledge is correct.

We also note that in the Virginia litigation in which the firm of Greitzer and Locks are participating in current litigation, the firm will comply with the following "shielding" provisions.

(a) He will not directly work on those cases,

(b) He will not advise the firm on any matters concerning these cases,

(c) He will not participate indirectly in those cases by way of legal analysis, taking or preparing

for any discovery, advice or in any way whatsoever,

(d) He will not be given access to any of the files, and

(e) He will not share in any monies derived from those cases.

We have no objection to this "shielding" arrangement for the Virginia cases.

We are not clear whether this "shielding" arrangement is to apply to all cases in which Mr. Peterson had personal and substantial participation including those in which he supervised subordinate attorneys.

Accordingly, we must reserve any objections that we may have with respect to Mr. Peterson's participation in such cases, until we are advised on a case-by-case basis, the extent to which he will participate in such ongoing litigation. We must similarly reserve our objections with respect to any new cases which

involve present or former employees of naval shipyards and ask to be advised on a case-by-case basis of the nature and extent of Mr. Peterson's participation in those cases.

Sincerely yours,

PATRICK J. GNAZZO
Director

APPENDIX I

DEPARTMENT OF THE NAVY
Office of the General Counsel
Washington, D. C. 20360
30 January 1981

OGC/LD/MA:lkb

John J. Farley, III, Esquire
Director, Torts Branch
Civil Division
Department of Justice
Washington, DC 20530

Dear Mr. Farley:

Your letter of January 23, 1981, advises of the disposition of the disqualification questions raised by Neil R. Peterson's leaving the Department to join the firm of Greitzer & Locks, who are engaged in substantial asbestos litigation. The Waiver of Disqualification document and the exchange of correspondence noted in your letter, would in our opinion, fully protect the interests of the Navy in the ongoing and future asbestos litigation.

We shall, of course, advise you of any circumstances relating to this matter

should we encounter them in the course of preparing for current or future asbestos litigation.

Sincerely yours,

Patrick J. Gnazzo
Director

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
Norfolk - Newport News Divisions

IN RE ASBESTOS CASES C/P 77-1

WAIVER BY THE UNITED STATES
OF ANY IMPUTED DISQUALIFICATION
OF THE FIRM OF GREITZER & LOCKS

The United States of America waives any disqualification by imputation of the law firm of Greitzer & Locks in this litigation.

Neil R. Peterson, Esquire, presently associated with the firm of Greitzer & Locks and a former Special Litigation Counsel in the Civil Division of the United States Department of Justice, is personally disqualified from participating on behalf of plaintiffs in this litigation by virtue of his prior representation of the United States. In September, 1980, Mr. Peterson advised the Civil Division of his intention to depart from the De-

partment of Justice and to join the firm of Greitzer & Locks and he noted his personal disqualification from certain litigation, including these cases. He further represented that his firm was prepared to screen him from participation and remuneration in the Norfolk and Newport News litigation and requested the Department of Justice to waive any imputed disqualification of his new firm in this litigation.

To evaluate the extent of Mr. Peterson's personal disqualification and the effectiveness of the proposed screening provisions, the Civil Division initiated contact with, and sought the views of, the client agencies involved in all asbestos litigation handled and supervised by Mr. Peterson while he was an employee of the Department of Justice. In addition, the Civil Division conducted a detailed review of Mr. Peterson's activities. This entailed an extensive file review, additional consultation with

the client agencies, and interviews with Department of Justice attorneys who worked with and for Mr. Peterson.

Upon completion of this review in December, 1980, the Civil Division sought the guidance of the Office of Legal Counsel of the Department of Justice, which is responsible for giving "guidance and assistance . . . in matters relating to ethical conduct, particularly matters subject to the provisions of the conflict of interests laws." (28 C.F.R. Section 0.25(k)). On January 6, 1981, the Office of Legal Counsel advised the Civil Division that the waiver decision was the responsibility of the Civil Division. It also indicated that the Department favors waivers in cases where the former employee will be effectively and completely screened by the firm. With respect to Greitzer & Locks' continued participation in the Norfolk and Newport News cases, the Office of Legal Counsel expressed concern that

Mr. Peterson's continued participation on behalf of the firm in other asbestos litigation against the United States could, either intentionally or through mere inadvertence, vitiate the effectiveness of the proposed screen in the Norfolk and Newport News cases.

By letter dated January 7, 1981, a copy of which is attached as Exhibit "A", Mr. Peterson and the firm, through counsel, committed themselves to a course of action that alleviated the concerns expressed by the Office of Legal Counsel, the Civil Division and the client agencies. In essence, Mr. Peterson and his firm have agreed to implement and maintain a program under which Mr. Peterson will not participate in any way and will be screened from substantive involvement and financial participation in cases in which the United States is or may become a direct defendant. If the United States should be named as

a third-party defendant in asbestos litigation from which Mr. Peterson is not otherwise disqualified, his role in such cases will be confined to participation against the direct defendants only; he will not participate in any aspect of the case, including discovery, relating to the involvement of the United States; and even these cases will be subject to a case-by-case review in order to determine whether Mr. Peterson should refrain from participation to insure the effectiveness of screening arrangements which exist in these and other cases.

Based upon the commitment summarized above, the Assistant Attorney General for the Civil Division waived any imputation of Mr. Peterson's personal disqualification to the firm of Greitzer & Locks in the Norfolk and Newport News cases and so advised counsel by letter dated January 9, 1981, a copy of which is attached as

Exhibit "B".

ALICE DANIEL
Assistant Attorney General
Civil Division

JUSTIN W. WILLIAMS
United States Attorney

JOHN J. FARLEY, III
Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: 202-724-6805
Attorneys for United State

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK & NEWPORT NEWS DIVISIONS

JAMES T. OMAN, FRED R. WALKER, HUGH V. REYNOLDS, and WILLIE A. GIBBONS, Plaintiffs,	:	CIVIL ACTION NO. 82-22-NN
v. JOHNS-MANVILLE CORP., et al, Defendants.	:	AFFIDAVIT OF JAMES T. OMAN FRED R. WALKER, HUGH V. REYNOLDS, and WILLIE A. GIBBONS

STATE OF VIRGINIA,
CITY OF NEWPORT NEWS, to-wit:

The undersigned, being first duly sworn, make oath as follows:

1. We are Plaintiffs in the above-captioned lawsuit.

2. We are personally acquainted with Gene Locks and personally approved his selection to be associated as a specialist in such matters in the trial of our case against asbestos manufacturers,

in association with our local attorneys, Robert R. Hatten and Richard S. Glasser.

3. We observed Mr. Locks in his preparation for the original trial, and in his management of that trial. We are completely satisfied with his representation of our interests, and feel that he is totally dedicated to us, and is an invaluable member of the team of attorneys representing us.

4. We are aware that the agreed fee for our attorneys is 40%, but we feel that our attorneys, especially Mr. Locks, who have worked for over six years to prosecute these complicated cases, will have earned every cent of their fee if we are successful in these trials. Mr. Locks has represented us since the fall of 1976, and from that time to the present he has been opposed by approximately ten different law firms representing some of the ablest lawyers in Virginia. If we are successful,

he must share his fee with my other attorneys, Robert R. Hatten, Joel Klein, and Richard Glasser, and Mr. Locks' percentage of the proceeds of my recovery will be 7% or less. Because the issues in the appeal of our case affected many other cases, our attorneys long ago voluntarily waived the additional 5% fee originally agreed for an appeal.

5. While we admire and respect our local lawyers, we know they have depended heavily on Mr. Locks to handle certain parts of the case, as was desired and intended by us. They and we will be greatly handicapped if he cannot help try our case at the new trial. We request the Court to wait until June 14, 1982, or after, to start our trial, in the hope that Mr. Locks can participate.

Given under my hand this 9th day of April, 1982.

JAMES T. OMAN

FRED R. WALKER

HUGH V. REYNOLDS

WILLIE A. GIBBONS

Subscribed and sworn to before me on the date last above written in my said city.

Notary Public

My Commission Expires:

APPENDIX L

U.S. DEPARTMENT OF JUSTICE
Civil Division

25 May 1982

Robert C. Nusbaum, Esquire
Hofheimer, Nusbaum, McPhaul & Brenner
1010 Plaza One
Post Office Box 3508
Norfolk, Virginia 23514

Re: Greitzer & Locks v.
Johns-Manville Corporation
(4th Cir.)

Dear Mr. Nusbaum:

I must decline your suggestion that the Justice Department monitor and investigate the screening arrangements at Greitzer & Locks. As I am sure you will understand, we cannot commit our limited resources to monitoring the affairs of former government attorneys who enter private practice, even when they become involved in disqualification litigation. Moreover, such an investigation here might tend to suggest

that we lack confidence in our original decision to waive disqualification of Greitzer & Locks. That decision was based on the presumption that Mr. Peterson and Greitzer & Locks would implement their screening commitment in good faith, a presumption that still holds.

I appreciate your concern that the en banc court of appeals have the benefit of full information in deciding this case. Our amicus brief fully sets forth the United States' position, however, and there is nothing we would add to that brief at this time.

Please feel free to contact us again if you have any questions.

Sincerely,

J. PAUL McGRATH
Assistant Attorney General
Civil Division

APPENDIX M

EXCERPT FROM BRIEF OF THE UNITED STATES AS AMICUS CURIAE GREITZER & LOCKS, et al., v. JOHNS-MANVILLE CORP., et al. NO. 81-1379

The law firm joined by a departing Justice Department attorney is expected to submit a letter to the head of the appropriate office or division of the Department identifying matters in the firm which the former government attorney was involved while in government, explaining the screening measures taken in insulating the attorney from involvement in such matters, and requesting the Department official's consent to the firm's handling of the matters. The Department's Office of Legal Counsel, which has responsibility for ethical concerns in the Department, 28 C.F.R. 0.25(k) and 45.735-26(b), is available for consultation with various components of the Department with respect to such requests.

After appropriate review, waiver requests are ordinarily granted if the reviewing official is satisfied that the screening procedures are adequate and that there is no residual appearance of significant impropriety affecting the interests of the government. Only where there would be some unique appearance of a conflict of interest that would not be adequately dispelled by screening would the Department decline to waive the imputed disqualification of the entire law firm. Such an occasion might arise, for example, if the law firm had failed to adopt a screening mechanism at the outset and the former government attorney had already participated in the matter while in the firm. Other possible situations where a waiver would not be granted would include: cases where the ex-government attorney had revealed government confidences; cases where there is evidence that the former

government attorney was responsible for inducing the private client to retain the law firm in connection with the case; and cases where the private firm hired the government attorney in order to remove him from a position of effectiveness in the government with respect to the case.

In this regard, it should be emphasized that the waiver approach approved by the ABA and followed by the Department serves the salutary purpose of forcing the law firm, the individual former government attorney in the law firm, and the government official responsible for ruling on the waiver request to focus on the specific question of the attorney's and the firm's disqualification. The former waiver request and response underscore the solemnity

of the screening mechanism.[6/] Also, if the letter sent to the Department requesting a waiver were false in any material respect with regard to screening measures the firm represents it has undertaken or will take, those responsible could be prosecuted under 18 U.S.C. § 1001 for making a false statement to the government. Moreover, if the individual attorney or his law firm failed to abide by the screening procedures, they would

---

6/ If a government agency arbitrarily or capriciously declined to waive the imputed disqualification of the entire law firm notwithstanding adequate screening of the individual former government attorney, judicial relief would be available in the appropriate case. Kesselhaut v. United States, supra, 555 F.2d at 794. Similarly, where, as here, the government agency consents to the law firm's participation, another party to the litigation could request the court to review the agency's waiver determination and disqualify the law firm if that determination was found to be arbitrary and capricious and if some unique impropriety affecting the litigation were present. In both situations, of course, the determination by the agency concerned -- in effect the lawyer's former client -- is entitled to considerable deference, but we do not suggest that the waiver determination would be wholly beyond judicial review.

be guilty of serious ethical violations that could affect their professional reputations and their ability to practice law. These are important safeguards to the integrity of the screening process.7/

7/ Aside from the Department of Justice and the ABA, Congress has expressed concern that an overly stringent rule imputing an ex-government employee's disqualification to his entire firm would impair the government's recruitment of high-quality talent. Thus, in 1962, Congress declined to enact a proposal (H.R. 8140, § 207(c)) that would have imposed a harsh imputation rule on former government employees and their firms. The Department of Justice had opposed this proposal on the ground that it would make if difficult for a person with specialized experience to leave the government and enter into private activities in his field. See Hearings on H.R. 8140 before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 21-22 (1962) More recently, congressional committees considering conflict of interest legislation have expressed similar concerns. See S.Rep. No. 95-170, 95th Cong., 1st Sess., at 32 (1977) ("There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office"). See also H.R. Rep. No. 96-115, 96th Cong., 1st Sess., at 3-5 (1979).

Appendix N

EXCERPT FROM ABA KUTAK COMMISSION REPORT

RULE 1.10.

USE OF INFORMATION TO THE DISADVANTAGE OF A FORMER CLIENT IN VIOLATION OF RULE 1.9.

(c) SUBJECT TO THE LIMITATIONS OF RULE 1.7, A DISQUALIFICATION PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE CONSENT OF THE AFFECTED CLIENT AFTER DISCLOSURE.

*** *** ***

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) EXCEPT AS LAW MAY OTHERWISE EXPRESSLY PERMIT, A LAWYER SHALL NOT REPRESENT A PRIVATE CLIENT IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE, UNLESS THE APPROPRIATE GOVERNMENT AGENCY CONSENTS AFTER DISCLOSURE.

(b) A LAWYER SERVING AS A PUBLIC OFFICER OR EMPLOYEE SHALL NOT:

(1) PARTICIPATE IN A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY WHILE IN PRIVATE PRACTICE OR NONGOVERNMENTAL EMPLOYMENT, UNLESS UNDER APPLICABLE LAW NO ONE IS, OR BY LAWFUL DELEGATION MAY BE, AUTHORIZED TO ACT IN THE LAWYER'S STEAD IN THE MATTER; OR

(2) NEGOTIATE FOR PRIVATE EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS ATTORNEY FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY.

(c) IF A LAWYER IS DISQUALIFIED BY PARAGRAPH (a), NO LAWYER IN A FIRM WITH WHICH THAT LAWYER IS ASSOCIATED MAY UNDERTAKE OR CONTINUE REPRESENTATION IN THE MATTER UNLESS:

(1) THE DISQUALIFIED LAWYER IS SCREENED FROM ANY PARTICIPATION IN THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM; AND

(2) WRITTEN NOTICE IS PROMPTLY GIVEN TO THE APPROPRIATE GOVERNMENT AGENCY TO ENABLE THE AGENCY TO ASCERTAIN COMPLIANCE WITH THE PROVISIONS OF THIS RULE.

COMMENT: *** *** ***

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers

as well as to maintain high ethical standards. The provisions for screening in paragraph (c) and waiver in paragraph (a) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. *** *** ***

Paragraph (c)(1) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

NOTES:

Code Comparison

Rule 1.11(a) is similar to DR9-101 (B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

*** *** ***

With regard to Rule 1.11(c), an approximate counterpart is found in DR5-105(D), which provides that "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." There is no counterpart in the Code to the screening provision of Rule 1.11(c).

Legal Background

Paragraphs (a) and (b): This Rule supplements restrictions on successive representation stated in Rule 1.9. "The purpose most often ascribed to the limitation on former government attorneys is to avoid the manifest possibility that a former government lawyer's action as a public official might be influenced (or open to the charge that it had been influenced) by the hope of later being

employed privately to uphold or upset what he had done." Woods v. Covington County Bank, 537 F.2d 804, 814(5th Cir. 1976) (quoting ABA Formal Opinion 37 (1931)). The restrictions also respond to the concern that a former government lawyer may obtain unjust advantage over an adverse private party as a result of access to information concerning that party which could be obtained only by use of public resources available during tenure in public office. Handleman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973); Allied Realty v. Exchange Nat'l. Bank, 283 F. Supp. 464 (D. Minn. 1968); Hilo Metals Co. v. Learner Co., 258 F.Supp. 23 (D.Hawaii 1966); ABA Formal Opinion 135 (1935). Thus, a former government lawyer may be prohibited from representing private parties in a related matter even though it is not adverse to the government. See Woods v. Covington County

Bank, 537 F.2d 804(5th Cir. 1976); ABA Formal Opinion 37 (1931); ABA Formal Opinion 135 (1935).

Although maintaining public confidence in the government is an important consideration, the rules must not unnecessarily prejudice the government lawyer, deprive private litigants of their right to counsel of their own choosing, impede recruiting efforts by the government or impinge upon the government's own assessment of the extent to which its employees should be limited in future employment. See Fletcher, "Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door," 14 Creighton L. Rev. 707 (1980); Lacovara, "Restricting the Private Practice of Former Government Lawyers," 20 Ariz. L. Rev. 369 (1978); Morgan, "Appropriate Limits on Participation by a Former Agency Official in

Matters Before an Agency," 1980 Duke L.J. 1.

Under the Code, concerns arising from the employment of former government lawyers are addressed in DR 9-101. Some courts have also employed the language of Canon 9 and the heading of DR 9-101 to establish the "appearance of impropriety" as a substantive test in disregard of the specific standards set forth in the Code. E.g., Alpha Inv. Co. v. City of Tacoma, 536 P.2d 674 (Wash. Ct. App. 1975); cf. Kramer v. Scientific Control Corp. 534 F.2d 1085 (3rd Cir.), cert. denied, 429 U.S. 830 (1976) (private practice). See generally Kramer, "The Appearance of Impropriety Under Canon 9: A Study of Federal Judicial Process Applied to Lawyers," 65 Minn. L. Rev. 243 (1981). A number of courts, however, have stated that "the possible appearance of impropriety is simply too slender a

reed on which to rest...particularly... where...the appearance of impropriety is not very clear." Armstrong v. McAlpin, 625 F.2d 433, 445 (2d Cir. 1980) (en banc), vacated, 49 U.S.L.W. 3514(1981) (quoting Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979)). Accord, ABA Formal Opinion 342 (1975). Compare Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir.), cert. denied, 429 U.S. 830 (1976).

Rule 1.11 eliminates the term "appearance of impropriety" and sets forth more specifically the circumstances in which concern for public confidence in government necessitates disqualification of a government lawyer. See generally Lacovara, supra; Morgan, supra; Note, "Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?" 1977 Duke L.J. 512; Note, "Conflicts of

Interest and the Former Government Attorney," 65 Geo. L.J. 1025 (1977); Note, "The Chinese Wall Defense to Law Firm Disqualification," 128 U.Pa.L.Rev. 677(1980).

*** *** ***

The direct disqualification of a former government lawyer under paragraph (a) may be waived by the former agency in proper circumstances. Waiver may be in the public interest. See Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974).

*** *** ***

Paragraph (c): A growing number of authorities recognize that imputed disqualification of a firm is a harsh remedy that the screening can adequately protect public confidence, the interests of the former government lawyer, and the interest of private litigants in selecting counsel of their own choosing. See Arm-

strong v. McAlpin, 625 F.2d 433 (2d Cir. 1980)(en banc), vacated, 49 U.S.L.W. 3514 (1981); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); ABA Formal Opinion 342 (1975); N.Y. Opinion 889, reprinted in 31 Record 552 (1976); Wiley, "Speaking Out Against Ethics Committee Inquiry 19," Dist. Law. 35 (Winter 1976); Note "Screening To Rebut the Automatic Law Firm Disqualification Rule," 82 Dick. L.Rev. 625 (1978); Comment, "Conflicts of Interest and the Former Government Attorney," 65 Geo. L.J. 1025 (1977); Comment, "The Chinese Wall Defense to Law Firm Disqualification," 128 U. Pa. L.Rev. 677 (1980).

With respect to the nature of the screening required see, Armstrong v. McAlpine, 625 F.2d 433 (2d Cir. 1980) (en banc), vacated, 49 U.S.L.W. 3514 (1981). Judicial scrutiny of a screening mechanism may be necessary to assure com-

plicance with the provisions of this Rule. See Armstrong v. McAlpine, 625 F.2d 433; Note, "Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?" 1977 Duke L.J. 512; Comment, "Conflicts of Interest and the Former Government Attorney," 65 Geo. L.J. 1025 (1977).

Consent of the affected government agency is not necessary under paragraph (c), for such a requirement would provide agencies with unregulated discretionary power. Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977). The agency is entitled to notice and an opportunity to determine compliance with paragraph (c). However, the former government client is also protected by Rule 1.9 and must consent to any adverse representation in substantially related matters, see United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979), as well as to any use of informa-

tion relating to the prior representation whether or not the lawyer's representation of a private client is adverse to the government. See, e.g., United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973); United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979); Telos v. Hawaiian Tel. Co., 397 F.Supp. 1314 (D. Hawaii 1975). In such cases, the imputed disqualification of Rule 1.10 applies and screening may be employed only with the consent of the former government client. However, information may often fall within the exception stated in Rule 1.9(a) regarding information that becomes generally known. See Morgan, "Appropriate Limits on Participation by a Former Agency Official in Matters Before the Agency," 1980 Duke L.J. 1, 37-38.

*** *** ***

APPENDIX O

EXCERPTS

AMERICAN BAR ASSOCIATION

COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 342 November 24,1975

Following the 1974 amendment of DR 5-105(D), which extended every disqualification of an individual lawyer in a firm to all affiliated lawyers, the interpretation and application of DR 9-101(B) have been increasingly of concern to many government agencies as well as to many former government lawyers now in private practice. DR 9-101(B) is based upon former ABA Canon 36, but its standard or test is different. Our task is to interpret DR 9-101(B) in light of its history and in consideration of its underlying purposes and policies.

DR 9-101(B) reads as follows:

A lawyer shall not accept private

employment in a manner in which he had substantial responsibility while he was a public employee.

At the outset, the relationship between DR 9-101(B) and the provisions of Canons 4 (Confidences and Secrets) and 5 (Independent Professional Judgment) should be explored briefly. To some extent, the Disciplinary Rules of those two canons reinforce the same ethical concepts underlying DR 9-101(B).

The Disciplinary Rules of Canon 4 generally forbid a lawyer to reveal or use a confidence or secret of a client; see DR 4-101(B). That rule applies to a government lawyer as well as to private practitioners, for "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." A lawyer violates DR 4-101(B) only by knowingly revealing a confidence or

secret of a client or using a confidence or secret improperly as specified in the rule. Nevertheless, many authorities have held that as a procedural matter a lawyer is disqualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to the pending litigation. Even though DR 4-101(B) is not breached by the mere act of accepting present employment against a former client involving a matter substantially related to the former employment, the procedural disqualification protects the former client in advance of and against a possible future violation of DR 4-101(B).

The Disciplinary Rules of Canon 5 bring into professional regulation, and with some specificity, the ancient maxim that one cannot serve two masters. The Disciplinary Rules of Canon 5 are con-

cerned largely with the effect of dual representation upon the quality of the professional service rendered to a client. Therefore the rules generally require a lawyer to refuse employment or to withdraw from employment when his exercise of professional judgment on behalf of a client may be affected; see DR 5-105; EC 5-14; and EC 5-15. The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected. To this extent, the Disciplinary Rules of Canon 5 regulate the employment a lawyer may undertake after concluding or terminating past employment, whether the past employment was as a private or as a public lawyer.

DR 9-101(B) appears under the maxim of Canon 9, "A Lawyer Should Avoid Even

the Appearance of Professional Impropriety." It is obvious, however, that the "appearance of professional impropriety" is not a standard, test or element embodied in DR 9-101(B). DR 9-101(B) is located under Canon 9 because the "appearance of professional impropriety" is a policy consideration supporting the existence of the Disciplinary Rules. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.

The policy considerations underlying DR 9-101(B) have been thought to be the following: the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from

handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.

There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner not to restrict unduly the lawyer's future employment are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice

nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience.

* * *

The extension by DR 5-105(D) of disqualification to all affiliated lawyers is to prevent circumvention by a lawyer of the Disciplinary Rules. Past government employment creates an unusual situation in which inflexible application of DR 5-105(D) would actually thwart the policy considerations

underlying DR 9-101(B). The question of the application of DR 5-105(D) to the situation in which a former government employee would be in violation of DR 9-101(B) should be considered in the light of those policy considerations, viz: opportunities for government recruitment and the availability of skilled and trained lawyers for litigants should not be unreasonably limited in order to prevent the appearance of switching sides, yet confidential information should be safeguarded, and government lawyers should be discouraged from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service. The desire to avoid the appearance of evil, even though less important, must be considered. A realistic construction of DR 5-105(D)

should recognize and give effect to the divergent policy considerations when government employment is involved.

* * *

Likewise, DR 9-101(B)'s command of refusal of employment by an individual lawyer does not necessarily activate DR 5-1-5(D)'s extension of that disqualification. The purposes of limiting the mandate to matters in which the former public employee had a substantial responsibility are to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the

matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm. (Emphasis supplied)

All of the policies underlying DR 9-101(B), including the principles of Canons 4 and 5, can be realized by a less stringent application of DR 5-105(D). The purposes, as embodied in DR 9-101(B), of discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to

those particular matters after leaving government service, and of avoiding the appearance of impropriety, can be accomplished by holding that DR 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility. Applying DR 5-105(D) to this limited extent accomplishes the goal of destroying any incentive of the employee to handle his government work so as to affect his future employment. Only allegiance to form over substance would justify blanket application of DR 5-105(D) in a manner that thwarts and distorts the policy considerations behind DR 9-101(B). (Emphasis supplied)

Our conclusion is further supported by the fact that DR 5-105(C) allows the multiple representation that is generally forbidden by DR 5-105(A) and (B), where all clients consent after full disclosure of the possible effect of such representation. DR 5-105(A) and (B) deals, of course, with much more egregious contingencies than those covered by DR 9-101(B). It is unthinkable that the drafters of the Code of Professional Responsibility intended to permit the one afforded protection by DR 5-105(A) and (B) to waive that protection without also permitting the one protected by DR 9-101(B) to waive that less-needed protection. Accordingly, it is our opinion that whenever the government agency is satisfied that screening measures will effectively isolate the individual lawyer from participating in the par-

ticular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question. (Emphasis supplied)

Although this opinion has dealt explicitly and at length with the interpretation and application of DR 9-101(B), it is not amiss to point out that, on the ethical rather than the disciplinary level of professional responsibility, each lawyer should

advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his undertaking the employment and should also resolve all doubts against the acceptance of questionable employment. See EC 5-15 and EC 5-16.